



04-26-07

AP  
JPW

Atty. Dkt. No. 071949-1328

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**Applicant:** Kenneth F. Buechler

**Title:** DIAGNOSTIC DEVICES AND APPARATUS FOR THE CONTROLLED MOVEMENT OF REAGENTS WITHOUT MEMBRANES

**Appl. No.:** 10/697,351

**Filing Date:** 10/29/2003

**Examiner:** Alexander, Lyle

**Art Unit:** 1743

**Confirmation Number:** 7522

<b>CERTIFICATE OF EXPRESS MAILING</b>	
I hereby certify that this correspondence is being deposited with the United States Postal Service's "Express Mail Post Office To Addressee" service under 37 C.F.R. § 1.10 on the date indicated below and is addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.	
<b>EV 929835419 US</b>	<b>4-25-2007</b>
(Express Mail Label Number)	(Date of Deposit)
<b>Julienne P. Bntt</b>	
(Printed Name)	
(Signature)	

**APPEAL BRIEF TRANSMITTAL**

Mail Stop Appeal Brief-Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

Transmitted herewith is an amendment in the above-identified application.

[ X ] Appeal Brief (24 pages) with 3 attachments (Exhibits).

[ X ] Credit Card Payment Form.

[ X ] Return Postcard.

[ X ] The fee required for additional claims is calculated below:

	Claims As Amended		Previously Paid For		Extra Claims Present		Rate		Additional Claims Fee
Total Claims:	6	-	20	=	0	x	\$50.00	=	\$0.00
Independent Claims:	1	-	3	=	0	x	\$200.00	=	\$0.00
First presentation of any Multiple Dependent Claims:						+	\$0.00	=	\$0.00
CLAIMS FEE TOTAL									= \$0.00

☒ Applicant hereby petitions for an extension of time under 37 C.F.R. §1.136(a) for the total number of months checked below:

<input checked="" type="checkbox"/> Extension for response filed within the first month:	\$120.00	\$120.00
<input type="checkbox"/> Extension for response filed within the second month:	\$450.00	\$0.00
<input type="checkbox"/> Extension for response filed within the third month:	\$1,020.00	\$0.00
<input type="checkbox"/> Extension for response filed within the fourth month:	\$1,590.00	\$0.00
<input type="checkbox"/> Extension for response filed within the fifth month:	\$2,160.00	\$0.00
EXTENSION FEE TOTAL:		\$120.00

<input checked="" type="checkbox"/>	Appeal Brief Fee	\$500.00
	FEE TOTAL:	\$620.00
<input type="checkbox"/>	Small Entity Fees Apply (subtract ½ of above):	\$0.00
	TOTAL FEE:	\$620.00

A credit card payment form in the amount of \$620.00 is enclosed.

The Commissioner is hereby authorized to charge any additional fees which may be required regarding this application under 37 C.F.R. §§ 1.16-1.17, or credit any overpayment, to Deposit Account No. 50-0872. Should no proper payment be enclosed herewith, as by the credit

card payment form being unsigned, providing incorrect information resulting in a rejected credit card transaction, or even entirely missing, the Commissioner is authorized to charge the unpaid amount to Deposit Account No. 50-0872.

If any extensions of time are needed for timely acceptance of papers submitted herewith, applicant hereby petitions for such extension under 37 C.F.R. §1.136 and authorizes payment of any such extensions fees to Deposit Account No. 50-0872.

Please direct all correspondence to the undersigned attorney or agent at the address indicated below.

Respectfully submitted,

Date 04/25/2007

FOLEY & LARDNER LLP  
Customer Number: 30542  
Telephone: (858) 847-6722  
Facsimile: (858) 792-6773

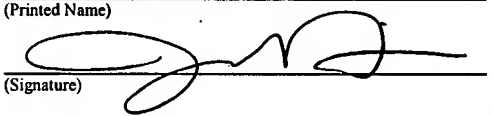
By Barry Wilson  
Richard J. Warburg, Reg. No. 32,327  
Barry S. Wilson, Reg. No. 39,431  
Attorneys for Applicant



PATENT  
071949-1328

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Kenneth F. Buechler  
Title: DIAGNOSTIC DEVICES AND  
APPARATUS FOR THE  
CONTROLLED MOVEMENT OF  
REAGENTS WITHOUT  
MEMBRANES  
Appl. No.: 10/697,351  
Filing Date: 10/29/2003  
Examiner: Alexander, Lyle

CERTIFICATE OF EXPRESS MAILING	
I hereby certify that this correspondence is being deposited with the United States Postal Service's "Express Mail Post Office To Addressee" service under 37 C.F.R. § 1.10 on the date indicated below and is addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.	
EV 727835419 US	4-25-07
(Express Mail Label Number)	(Date of Deposit)
Julienne P. Britt	
(Printed Name)	
	
(Signature)	

APPEAL BRIEF

Mail Stop Appeal Brief - Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

Applicant (hereinafter "Appellant") hereby appeals the Final Rejection of claims 1 and 3-7, which corresponds to all claims pending in the application. This Appeal Brief is accompanied by the requisite fee set forth in 37 C.F.R. § 1.17(f). If this fee is incorrect or if any additional fees are due in this regard, please charge or credit our Deposit Account No. 50-0872 for the appropriate amount.

*Table of Contents*

Table of Authorities .....	4
Real Party in Interest .....	4
Related Appeals and Interferences .....	4
Status of Claims .....	4
Status of Amendments .....	4
Summary Claimed Subject Matter .....	5
Grounds for Rejection to be Reviewed on Appeal .....	6
Argument .....	8
<u>1. Rejection of claims 1 and 3-7 under 35 U.S.C. § 112</u> .....	8
<u>2. Rejection of claim 6 under 35 U.S.C. §112</u> .....	10
<u>3. Rejection of claim 7 under 35 U.S.C. §112</u> .....	11
<u>4. Rejection of claims 1, 5, and 7 under 35 U.S.C. § 102(b)</u> .....	12
<u>5. Rejection of claim 3 under 35 U.S.C. § 102(b)</u> .....	14
<u>6. Rejection of claim 4 under 35 U.S.C. § 102(b)</u> .....	15
<u>7. Rejection of claim 6 under 35 U.S.C. § 102(b)</u> .....	15
<u>8. Rejection of claims 1, 5 and 7 under 35 U.S.C. § 102(b)</u> .....	16
<u>9. Rejection of claim 3 under 35 U.S.C. § 102(b)</u> .....	18
<u>10. Rejection of claim 4 under 35 U.S.C. § 102(b)</u> .....	19
<u>11. Rejection of claim 6 under 35 U.S.C. § 102(b)</u> .....	20
Conclusion .....	21
<i>Appendix A: Claims Appendix</i> .....	22
<i>Appendix B: Evidence Appendix</i> .....	23
<i>Appendix C: Related Proceedings Appendix</i> .....	24

*Table of Authorities*

**CASES**

<i>All Dental Prodx, LLC v. Advantage Dental Prods., Inc.</i> , 309 F.3d 774, 64 USPQ2d 1945 (Fed. Cir. 2002) .....	9
<i>Ex Parte Kirkpatrick</i> , 1997 WL 33147777 (BPAI 1997).....	11
<i>Exxon Research &amp; Eng'g Co.</i> , 265 F.3d 1371, 60 USPQ2d 1272 (Fed. Cir. 2001) .....	9
<i>In re Bond</i> , 910 F.2d 831, 15 USPQ2d 1566 (Fed. Cir. 1990) .....	12
<i>Miles Labs., Inc. v. Shandon, Inc.</i> , 997 F.2d 870, 27 USPQ2d 1123 (Fed. Cir. 1993) .....	10
<i>Scripps Clinic &amp; Research Found. v. Genentech, Inc.</i> , 927 F.2d 1565, 18 USPQ2d 1896 (Fed. Cir. 1991) .....	12
<i>Scripps Research Inst. v. Nemerson</i> , 2005 WL 596766 (BPAI Feb. 17, 2005).....	9
<i>Tandon Corp. v. United States In'tl Trade Comm'n</i> , 831 F.2d 1017, 4 USPQ2d 1283 (Fed. Cir. 1987) .....	14, 19

**RULES**

MPEP § 2111.01 .....	10
MPEP § 2131 .....	12
MPEP § 2173.02 .....	10
MPEP § 804 (I)(B).....	8

**Real Party in Interest**

The real party in interest in this appeal is Biosite Diagnostics Incorporated, which is the assignee of the present application.

**Related Appeals and Interferences**

The following U.S. Patent Applications are presently on appeal, relate to the present application in so far as the claims relate to devices for handling of fluid samples, are also assigned to Biosite Diagnostics Incorporated, and have been examined by the same Examiner as the present application.

Application Number	Status
09/613,650	Appeal Brief filed January 22, 2007
10/153,423	Reply Brief filed June 27, 2006
10/697,351	Notice of Appeal filed January 25, 2007

**Status of Claims**

Claim 2 has been cancelled.

Claims 1 and 3-7 are pending in the application.

Claims 1 and 3-7 are the subject of this appeal.

**Status of Amendments**

The last claim amendments were presented in Appellant's Response To Office Action of February 27, 2007. The claim amendments contained therein have been entered, examined, and appealed herein. No other amendments or submissions are pending in the application.

**Summary of Claimed Subject Matter**

The claimed subject matter relates in part to assay devices for measuring analytes of interest (“target ligands”) in fluid samples. In particular, the present invention provides device components that provide for controlled movement of fluids in various regions of such devices.

Numerous test devices and systems that employ such devices have been developed over the years for measuring the presence or concentration of analytes in fluid samples, such as whole blood or urine. As discussed in some detail on pages 1 and 2 of the present specification, these devices typically employ test reagents and an absorbent member through which the fluid sample flows. Typical absorbent members include paper materials, glass fiber mats, porous membranes, etc., which move fluids by capillary action. Specification, p. 1, l. 28, through p. 2, l. 24. Test devices that rely on porous materials may have problems with the consistency of capillary flow and the binding characteristics from device batch to device batch. This is often because production of these porous materials is not easily reproducible in terms of their microscopic and macroscopic features. Specification, p. 5, ll. 3-12. In addition, the prior art devices often require precise pipetting of fluids and careful handling of reagents, and so must be used by relatively skilled technicians in a laboratory setting. Specification, p. 2, ll. 25-28.

To avoid such issues, the present invention relates to assay devices that rely on nonporous surfaces having defined surface characteristics to regulate fluid flow. Specifically, independent claim 1 encompasses devices comprising a nonporous surface having one or more immobilized particles, wherein the particles, ranging in size from 1 nm to 5  $\mu$ m, comprise antibodies or fragments thereof and which are capable of binding the target ligand(s). Support for claim 1 is found throughout the specification including, for example, at p. 5, ll. 3-5, p. 9, ll. 19-27, p. 25, ll. 12-29, and Example 4 (pp. 42-44).

In various dependent claims, the devices are further defined (i) as comprising specific surface characteristics. Claim 3 requires that “said surface is a textured surface comprising one or more depressions and/or protrusions extending between 1 nm and 0.5 mm from said surface.” Support for claim 3 is found in Figures 9A-9D, and 13-16 and at p. 28, ll. 11-24.



Claim 4 requires that “one or more of said particles are entrapped within depressions and/or between protrusions on the textured surface.” Support for claim 4 is found at p. 29, ll. 15-25 and p. 32, ll. 15-20.

Claim 5 requires particles made of specific materials (latex particles, silica particles, zirconia particles, alumina particles, titania particles, ceria particles, metal sol particles, and polystyrene particles). Support for claim 5 is found at p. 25, ll. 21-29 and in Examples 2-3 (pp. 41-42).

Claim 6 requires that the device comprises a second surface that forms a capillary space with the nonporous surface, and claim 7 requires that the non-porous surface is not part of a capillary space. Support for claims 6 and 7 is found in Figure 10, p. 5, l. 20 through p. 6, l. 6, p. 10, ll. 23-25 and Example 5 (pp. 44-47).

### **Grounds for Rejection to be Reviewed on Appeal**

#### **Rejections Appealed**

1. Claims 1 and 3-7 stand finally rejected under 35 U.S.C. § 112, second paragraph as allegedly being indefinite with regard to the phrases “nonporous surface” and “particle size range is from 1 nm to 5  $\mu$ m.”

2. Claim 6 stands finally rejected under 35 U.S.C. § 112, second paragraph as allegedly being indefinite with regard to the phrase “forms a capillary space between said nonporous surface and a second surface spaced at a capillary forming distance from said nonporous surface.”

3. Claim 7 stands finally rejected under 35 U.S.C. § 112, second paragraph as allegedly being indefinite with regard to the phrase “the nonporous surface is not part of a capillary space.”

4. Claims 1, 5, and 7 stand finally rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Findlay *et al.*, U.S. Patent 5,514,550.

5. Claim 3 stands finally rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Findlay *et al.*, U.S. Patent 5,514,550.

6. Claim 4 stands finally rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Findlay *et al.*, U.S. Patent 5,514,550.
7. Claim 6 stands finally rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Findlay *et al.*, U.S. Patent 5,514,550.
8. Claims 1, 5, and 7 stand finally rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Wu, U.S. Patent 5,387,510.
9. Claim 3 stands finally rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Wu, U.S. Patent 5,387,510.
10. Claim 4 stands finally rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Wu, U.S. Patent 5,387,510.
11. Claim 6 stands finally rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by Wu, U.S. Patent 5,387,510.

#### Rejections Previously Traversed

1. Claims 1, 2, 6 and 7 stand finally rejected under the judicially created doctrine of obviousness-type double patenting over U.S. Patents 5,458,852; 5,885,527; 6,019,944; 6,271,040; and 6,905,882. Appellant notes that claim 2 is listed in the rejection apparently in error, as claim 2 is not pending in the present application. Appellant notes that terminal disclaimers to each of these patents were filed on January 25, 2007. These rejections are traversed and not appealed herein.

2. Claims 1-7 stand finally rejected under the judicially created doctrine of obviousness-type double patenting over U.S. Patents 6,767,510; and 6,156,270. Appellant notes that claim 2 is listed in the rejection apparently in error, as claim 2 is not pending in the present application. Appellants note that terminal disclaimers to each of these patents were filed on January 25, 2007. These rejections are traversed and not appealed herein.

3. Claim 7 stands finally rejected under 35 U.S.C. § 112, second paragraph, as depending from a cancelled claim. This rejection was traversed by Appellant's amendment of February 27, 2007, which was acknowledged and entered by the Examiner pursuant to the Advisory Action of March 7, 2007. This rejection is moot and not appealed herein.

Rejections Not Appealed

1. Claims 1-7 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting over U.S. Patent Applications 10/792,258; and 11/022,297. Appellant notes that claim 2 is listed in the rejection apparently in error, as claim 2 is not pending in the present application.

No terminal disclaimer is procedurally required in a case where the provisional rejection involves two pending applications and where the rejection is the sole remaining issue in the case. *See* MPEP § 804 (I)(B) (“The ‘provisional’ double patenting rejection should continue to be made by the examiner in each application as long as there are conflicting claims in more than one application unless that ‘provisional’ double patenting rejection is the only rejection remaining in at least one of the applications.”).

In the event that other rejections of the present claims are successfully overcome on appeal, the current obviousness-type double patenting rejection would then be the sole remaining rejection, and withdrawal of the instant provisional rejection would be appropriate. Thus, this rejection is not addressed below in the Appeal Brief.

Argument

1. Rejection of claims 1 and 3-7 under 35 U.S.C. § 112, second paragraph

Appellant respectfully traverses the rejection of claims 1 and 3-7 as allegedly being indefinite with regard to the phrases “nonporous surface” and “particle size range is from 1 nm to 5  $\mu$ m,” and requests that the rejection be withdrawn or reversed.

Without further explanation or elaboration, the Examiner asserts that claim 1 “is vague and indefinite what is intended by a ‘nonporous surface’.” Office Action mailed April 7, 2006, p. 3. Appellant respectfully submits that the terms “porous” and “nonporous” are common English words that have well established meanings in the art. Stated simply, a porous surface is a surface comprising pores that are permeable to a particular fluid of interest, and a nonporous surface is one that does not comprise such pores.

As the Board of Patent Appeals and Interferences recently pointed out, the Examiner must establish that a claim is insolubly ambiguous to establish indefiniteness:

The threshold for indefiniteness is very high: the claim must be “insolubly ambiguous” . . . . If one of skill in the art would understand the scope of the claim when read in light of the specification, then the claim complies with § 112(2). Claims need not be models of clarity. As long as the meaning is discernible, then even if construction is difficult and the result equivocal, the claim is nevertheless definite. *Exxon Research & Eng’g Co.*, 265 F.3d at 1375, 60 USPQ2d at 1276; *All Dental Prodx, LLC v. Advantage Dental Prods., Inc.*, 309 F.3d 774, 779-80, 64 USPQ2d 1945, 1949 (Fed. Cir. 2002) (no indefiniteness despite the lack of clarity).

*Scripps Research Inst. v. Nemerson*, 2005 WL 596766, \*10 (BPAI Feb. 17, 2005). Based on the use of well understood English wording, the recitation of a “nonporous surface” does not render the claim “insolubly ambiguous,” and so meets the definiteness standard of 35 U.S.C. § 112, second paragraph. Appellant respectfully submits that, in rejecting the claims, the Examiner has not applied the required rigorous standard, and has not met the threshold for establishing indefiniteness.

Claim 1 also refers to particles comprising receptors immobilized thereon, and indicates that the “particle size range is from 1 nm to 5  $\mu$ m.” Again, without elaboration, the Examiner contends that “the particle size range [in claim 1] is confusing is diameter intended [sic].” Office Action mailed April 7, 2006. Appellant respectfully submits that the use of such particles is common in the art, and their dimensions are typically described in terms of a “particle size,” which refers to a mean diameter for the particles used. *See, e.g.*, National Institute of Standards and Technology publication NISTR 6935, “Particle Size Measurement for Spheres with Diameters of 50 nm to 400 nm.” Particles having various “particle sizes” are available from a variety of commercial sources. *See, e.g.*, Duke Scientific Corporation Sales Bulletin 112A, “General Purpose Latex Particles.” Based on its common use in the art, that recitation of a “particle size range” does not render the claim “insolubly ambiguous,” and so meets the definiteness standard of 35 U.S.C. § 112, second paragraph.

In maintaining the rejection, the Examiner states only that “[t]he Office request Applicant to point out specific occurrences in the specification that adequately define these terms in clear and unambiguous language.” Office Action mailed October 25, 2006, p. 4. But the question of

definiteness under 35 U.S.C. § 112, second paragraph, does not turn upon whether or not a specification defines terms “in clear and unambiguous language.” Instead, the essential inquiry is whether the claims, when read in light of the content of the specification and the knowledge available to the skilled artisan, set out and circumscribe the claimed subject matter with reasonable particularity. *See, e.g.*, MPEP § 2173.02; *see also*, *Miles Labs., Inc. v. Shandon, Inc.*, 997 F.2d 870, 875, 27 USPQ2d 1123, 1127 (Fed. Cir. 1993) (“If the claims read in the light of the specification reasonably apprise those skilled in the art of the scope of the invention, § 112 demands no more.”) (emphasis added).

Because the claims must be read in light of the knowledge available to the skilled artisan, claim terms not otherwise explicitly defined in the specification take on their ordinary and customary meaning in the art. *See, e.g.*, MPEP § 2111.01. The Examiner has failed to consider the disputed language with the requisite knowledge available. Furthermore, by insisting that the specification must provide a definition for the disputed language, the Examiner has applied a definiteness standard that does not comport with the established legal standard.

In view of the foregoing, Appellant respectfully submits that claims 1 and 3-7 reasonably apprise those skilled in the art of the scope of the invention. Because the requirements of 35 U.S.C. § 112, second paragraph, demand no more, Appellant requests that the rejection be withdrawn or reversed.

2. Rejection of claim 6 under 35 U.S.C. § 112, second paragraph

Appellant respectfully traverses the rejection of claim 6 as allegedly being indefinite, and requests that the rejection be withdrawn or reversed.

Claim 6 refers to a nonporous surface that “forms a capillary space between said nonporous surface [of claim 1, from which claim 6 depends] and a second surface spaced at a capillary forming distance from said nonporous surface.”

Without further explanation or elaboration, the Examiner alleges that it is “confusing what structure is contemplated by the claimed second surface and how it interacts with the nonporous surface.” Office Action mailed April 7, 2006, p. 3. Appellant respectfully submits that, to the contrary, the claim could not be more clear in this regard. The “second surface” is a surface other than the “nonporous surface,” and it is spaced at a capillary forming distance from

the nonporous surface, thereby forming a capillary space. Such a clearly articulated description of the claimed assay device cannot plausibly be considered “insolubly ambiguous,” and so meets the definiteness standard of 35 U.S.C. § 112, second paragraph.

In view of the foregoing, Appellant respectfully submits that claim 6 reasonably apprises those skilled in the art of the scope of the invention. Because the requirements of 35 U.S.C. § 112, second paragraph, demand no more, Appellant requests that the rejection be withdrawn or reversed.

3. Rejection of claim 7 under 35 U.S.C. § 112, second paragraph

Appellant respectfully traverses the rejection of claim 7 as allegedly being indefinite, and requests that the rejection be withdrawn or reversed.

Claim 7 further limits any of claims 1 and 3-5 by adding the negative limitation that “the nonporous surface is not part of a capillary space. Such devices are described in the specification as filed, for example on page 32 in the section entitled “Diagnostic Elements Other Than Capillaries.”

The Examiner rejects this claim as being indefinite for not further limiting the claims from which claim 7 depends, asserting that “[a]pparently this claim is directed to claiming the absence of a structure (e.g. absence of a capillary space) and is not readily understood.” Office Action mailed April 7, 2006, p. 3. Thus, the Examiner apparently believes that a negative limitation does not “further limit any one of the previous claims.” *Id.*

To the contrary, claims may use functional language, alternative expressions, negative limitations, or any style of expression or format of claim which makes clear the boundaries of the subject matter for which protection is sought. *See, e.g., Ex Parte Kirkpatrick*, 1997 WL 33147777 (BPAI 1997). In this case, the negative limitation clearly indicates that the “nonporous surface” referred to in the claims from which claim 7 depends “is not part of a capillary space.” This description of the claimed assay device is not “insolubly ambiguous,” and so meets the definiteness standard of 35 U.S.C. § 112, second paragraph.

In view of the foregoing, Appellant respectfully submits that claim 7 reasonably apprises those skilled in the art of the scope of the invention. Because the requirements of 35 U.S.C. §

112, second paragraph, demand no more, Appellant requests that the rejection be withdrawn or reversed.

4. Rejection of claims 1, 5 and 7 under 35 U.S.C. § 102(b) over Findlay *et al.*, U.S. Patent 5,514,550

Appellant respectfully traverses the rejection of claims 1, 5 and 7 as allegedly being anticipated by the Findlay *et al.* patent, and requests that the rejection be withdrawn or reversed.

To support a rejection under 35 U.S.C. § 102, a single prior art reference must describe each of the elements and limitations of the rejected claim. *Scripps Clinic & Research Found. v. Genentech, Inc.*, 927 F.2d 1565, 18 USPQ2d 1896 (Fed. Cir. 1991), *In re Bond*, 910 F.2d 831, 832, 15 USPQ2d 1566, 1567 (Fed. Cir. 1990), *see also*, MPEP § 2131.

Claim 1 is directed to assay devices for detecting one or more target ligands comprising (i) a nonporous surface; (ii) one or more particles immobilized to the nonporous surface, where the particles have a size range from 1 nm to 5 µm; and (iii) antibodies or fragments thereof immobilized on the particles, where the antibodies or fragments are capable of binding the target ligand(s).<sup>1</sup>

In contrast, the cited Findlay *et al.* patent is directed to detection of a target ligand (in this case a nucleic acid, *see* Findlay *et al.*, paragraph bridging col. 3 and 4), using particles having nucleic acids bound to their surfaces that are capable of binding the target ligand. These solid phase-bound nucleic acid “probes” are discussed, for example, in col. 4, ll. 52-67 of Findlay *et al.*

The Findlay *et al.* patent does discuss the use of antibodies, albeit in a single sentence. But this discussion is limited to the use of antibodies only as a detectable label. For example, Findlay *et al.* states at col. 7, ll. 15-26 (emphasis added):

The present invention also encompasses a method for using the test article described herein to detect a predetermined nucleic acid. The general description

---

<sup>1</sup> Claim 5 depends from claim 1, further providing that the particles are selected from the group consisting of latex particles, silica particles, zirconia particles, alumina particles, titania particles, ceria particles, metal sol particles, and polystyrene particles. Claims 1 and 5 stand or fall together with respect to the rejection based upon the Findlay *et al.* patent. The Examiner addresses the specific particle materials in the Office Action mailed April 7, 2006, p. 4.

of the method is provided above. In one embodiment, the test article is used in a sandwich hybridization assay where a second probe is used to provide detection of the resulting three-part hybrid. This second probe is also complementary to the predetermined nucleic acid, and contains a moiety which provides detection in some manner (as discussed above). Preferably, the second probe is labeled with avidin, biotin, antibody, antigen, hapten, lectin, sugar (or another specific binding moiety), or other detectable moieties described below.

The Examiner bases the rejection on the assertion that “the instant claim language only requires the presence of antibodies or fragments bound to a nonporous surface.” Office Action mailed October 25, 2006, p. 4. This assertion, however, fails to consider the plain language of the claims.

Claim 1 is directed to “an assay device for detecting one or more target ligands in a sample,” and the device as claimed comprises antibodies or fragments thereof immobilized upon particles, where the antibodies are “capable of binding said one or more target ligands.” In contrast, the antibodies disclosed in the Findlay *et al.* patent are never capable of binding to a target ligand, because they are specifically selected for a different purpose. Specifically, according to the Findlay *et al.* patent, antibodies are selected and used as detectable labels, while nucleic acid probes provide the role of being “capable of binding said one or more target ligands.” See *e.g.*, Findlay *et al.*, Abstract.

Because of this, the devices disclosed in the Findlay *et al.* patent are structurally different from those of the present claims. Present claim 1 requires a specific structure: antibodies or fragments thereof capable of binding one or more target ligands. As indicated in the section of Findlay *et al.* quoted above, the prior art devices would only comprise antibodies indirectly bound to a surface following use of the device for detection of a nucleic acid of interest. At that moment, the Findlay *et al.* device would have the following structure: particle → first probe nucleic acid → target ligand (nucleic acid of interest) → second probe nucleic acid → detectable moiety (antibody not capable of binding the target ligand). No structure corresponding to the antibodies of the present claims is contemplated in the Findlay *et al.* patent.

Appellant respectfully submits that because the cited patents do not provide each and every element set forth in the claims, no *prima facie* case of anticipation has been established, and requests that the rejection be withdrawn or reversed.



5. Rejection of claim 3 under 35 U.S.C. § 102(b) over Findlay *et al.*, U.S. Patent 5,514,550

Appellant respectfully traverses the rejection of claim 3 as allegedly being anticipated by the Findlay *et al.* patent, and requests that the rejection be withdrawn or reversed.

Claim 3 depends from claim 1, and so contains all of the limitations of claim 1. As discussed above, the devices disclosed in the Findlay *et al.* patent are structurally different from those of the present claims. Present claim 1 requires a specific structure: antibodies or fragments thereof capable of binding one or more target ligands. No structure corresponding to the antibodies of the present claims is contemplated in the Findlay *et al.* patent.

Claim 3 adds an additional limitation: that the surface to which the particles are immobilized is “a textured surface comprising one or more depressions and/or protrusions extending between 1 nm and 0.5 mm from said surface.”

The Examiner bases the rejection of claim 3 on an assertion that the particles that are specifically recited in claim 1 also correspond to the “depressions and/or protrusions” of the surface itself. Office Action mailed April 7, 2006, p. 4 (“The claimed protrusions extending between 1 microns [sic] to 0.5 mm has been read on the taught immobilized particles”).

Appellant respectfully submits that the claims unambiguously distinguish between the particles comprising antibodies or fragments thereof immobilized on the nonporous surface on one hand, and the depressions and/or protrusions extending between 1 nm and 0.5 mm from the nonporous surface on the other. This is all the more true in view of claim 4, which depends from claim 3 and further provides that the particles are entrapped within the depressions and/or protrusions. If it were true that the depressions and/or protrusions are to be “read on the taught immobilized particles,” such entrapment would be impossible.

In contrast, according to the Examiner’s interpretation of the claims in which the particles are the protrusions, the additional limitations recited in claims 3 and 4 become superfluous, and so the Examiner’s interpretation cannot be correct. “There is presumed to be a difference in meaning and scope when different words or phrases are used in separate claims.” *Tandon Corp. v. United States In’tl Trade Comm’n*, 831 F.2d 1017, 1023, 4 USPQ2d 1283, 1288 (Fed. Cir. 1987).

Appellant respectfully submits that because the cited patents do not provide each and every element set forth in the claims, no *prima facie* case of anticipation has been established, and requests that the rejection be withdrawn or reversed.

6. Rejection of claim 4 under 35 U.S.C. § 102(b) over Findlay *et al.*, U.S. Patent 5,514,550

Appellant respectfully traverses the rejection of claim 4 as allegedly being anticipated by the Findlay *et al.* patent, and requests that the rejection be withdrawn or reversed.

Claim 4 depends from claim 3, and so contains all of the limitations of both claims 1 and 3. As discussed above, the devices disclosed in the Findlay *et al.* patent are structurally different from those of the present claims. Present claim 1 requires a specific structure: antibodies or fragments thereof capable of binding one or more target ligands. No structure corresponding to the antibodies of the present claims is contemplated in the Findlay *et al.* patent.

Claim 3 adds an additional limitation: that the surface to which the particles are immobilized is “a textured surface comprising one or more depressions and/or protrusions extending between 1 nm and 0.5 mm from said surface.”

Claim 4 further provides that “one or more of said particles are entrapped within depressions and/or between protrusions on the textured surface.”

Nothing in the Examiner’s statement of rejection indicates where such a teaching of entrapping one or more particles “within depressions and/or between protrusions on the textured surface” may be found in the Findlay *et al.* patent. Because the Examiner has the initial burden of establishing a *prima facie* case of anticipation by pointing out where all of the claim limitations appear in a single reference, the Examiner’s failure to address the limitations of claim 4 cannot establish a *prima facie* case of anticipation of that claim.

Appellant respectfully submits that because the cited patents do not provide each and every element set forth in the claims, no *prima facie* case of anticipation has been established, and requests that the rejection be withdrawn or reversed.

7. Rejection of claim 6 under 35 U.S.C. § 102(b) over Findlay *et al.*, U.S. Patent 5,514,550

Appellant respectfully traverses the rejection of claim 6 as allegedly being anticipated by the Findlay *et al.* patent, and requests that the rejection be withdrawn or reversed.

Claim 6 depends ultimately from claim 1, and so contains all of the limitations of claim 1. As discussed above, the devices disclosed in the Findlay *et al.* patent are structurally different from those of the present claims. Present claim 1 requires a specific structure: antibodies or fragments thereof capable of binding one or more target ligands. No structure corresponding to the antibodies of the present claims is contemplated in the Findlay *et al.* patent.

Claim 6 further provides that “said nonporous surface forms a capillary space between said nonporous surface and a second surface spaced at a capillary forming distance from said nonporous surface.”

Nothing in the Examiner’s statement of rejection indicates where a teaching of forming such a capillary space between a nonporous surface and a second surface spaced at a capillary forming distance may be found in the Findlay *et al.* patent. Because the Examiner has the initial burden of establishing a *prima facie* case of anticipation by pointing out where all of the claim limitations appear in a single reference, the Examiner’s failure to address the limitations of claim 4 cannot establish a *prima facie* case of anticipation of that claim.

Appellant respectfully submits that because the cited patents do not provide each and every element set forth in the claims, no *prima facie* case of anticipation has been established, and requests that the rejection be withdrawn or reversed.

8. Rejection of claims 1, 5 and 7 under 35 U.S.C. § 102(b) over Wu, U.S. Patent 5,387,510

Appellant respectfully traverses the rejection of claims 1, 5, and 7 as allegedly being anticipated by the Wu patent, and requests that the rejection be withdrawn or reversed.

Claim 1 is directed to assay devices for detecting one or more target ligands comprising (i) a nonporous surface; (ii) one or more particles immobilized to the nonporous surface, where the particles have a size range from 1 nm to 5  $\mu$ m; and (iii) antibodies or fragments thereof immobilized on the particles, where the antibodies or fragments are capable of binding the target ligand(s).<sup>2</sup>

---

<sup>2</sup> Claim 5 depends from claim 1, further providing that the particles are selected from the group consisting of latex particles, silica particles, zirconia particles, alumina particles, titania particles, ceria particles, metal sol particles, and polystyrene particles. Claims 1 and 5 stand or fall together with respect to the rejection based upon

Like the Findlay *et al.* patent, the cited Wu patent is directed to detection of a target ligand (in this case a nucleic acid, *see* Wu, Abstract) using particles having nucleic acids bound to their surfaces that are capable of binding the target ligand. These solid phase-bound nucleic acid “probes” are discussed, for example, in col. 2, ll. 57-65 of Wu.

Like the Findlay *et al.* patent, the Wu patent discusses the use of antibodies in only a single sentence. And again, antibodies are used only as a detectable label; not for binding the target ligand (molecule of interest). For example, Wu states at col. 11, ll. 45-51 (emphasis added):

In a preferred embodiment, one of the primers is labeled with a specific binding ligand such as biotin, an antibody or lectin. The labeled primer provides (through amplification) an amplified target nucleic acid which has the specific binding ligand attached. This amplified nucleic acid is detected using a detectably labeled receptor for specific binding ligand.

The Examiner bases the rejection on the assertion that “the instant claim language only requires the presence of antibodies or fragments bound to a nonporous surface.” Office Action mailed October 25, 2006, p. 4. This assertion, however, fails to consider the plain language of the claims.

Claim 1 is directed to “an assay device for detecting one or more target ligands in a sample,” and the device as claimed comprises antibodies or fragments thereof immobilized upon particles, where the antibodies are “capable of binding said one or more target ligands.” In contrast, the antibodies disclosed in the Wu patent are never capable of binding to a target ligand, because they are specifically selected for a different purpose. Specifically, according to the Wu patent, antibodies are selected and used as detectable labels, while nucleic acid probes are “capable of binding said one or more target ligands.”

Thus, the devices disclosed in the Wu patent are structurally different from those of the present claims. Present claim 1 requires a specific structure: antibodies or fragments thereof capable of binding one or more target ligands. As indicated above, the prior art devices of Wu would only comprise antibodies indirectly bound to a surface following use of the device for

---

the Wu patent. The Examiner addresses the specific particle materials in the Office Action mailed April 7, 2006, paragraph bridging pp. 4 and 5.

detection of a nucleic acid of interest. At that moment, the Wu device would have the following structure: particle → first probe nucleic acid → target ligand (nucleic acid of interest) → second probe nucleic acid → detectable moiety (antibody not capable of binding the target ligand). No structure corresponding to the antibodies of the present claims is contemplated in the Wu patent.

Appellant respectfully submits that because the cited patents do not provide each and every element set forth in the claims, no *prima facie* case of anticipation has been established, and requests that the rejection be withdrawn or reversed.

9. Rejection of claim 3 under 35 U.S.C. § 102(b) over Wu, U.S. Patent 5,387,510

Appellant respectfully traverses the rejection of claim 3 as allegedly being anticipated by the Wu patent, and requests that the rejection be withdrawn or reversed.

Claim 3 depends from claim 1, and so contains all of the limitations of claim 1. As discussed above, the devices disclosed in the Wu patent are structurally different from those of the present claims. Present claim 1 requires a specific structure: antibodies or fragments thereof capable of binding one or more target ligands. No structure corresponding to the antibodies of the present claims is contemplated in the Wu patent.

Claim 3 adds an additional limitation: that the surface to which the particles are immobilized is “a textured surface comprising one or more depressions and/or protrusions extending between 1 nm and 0.5 mm from said surface.”

The Examiner bases the rejection of claim 3 on an assertion that the particles that are specifically recited in claim 1 also correspond to the “depressions and/or protrusions” of the surface itself. Office Action mailed April 7, 2006, p. 5 (“The claimed protrusions extending between 1 microns [sic] to 0.5 mm has been read on the taught immobilized particles”).

Appellant respectfully submits that the claims unambiguously distinguish between the particles comprising antibodies or fragments thereof immobilized on the nonporous surface on one hand, and the depressions and/or protrusions extending between 1 nm and 0.5 mm from the nonporous surface on the other. This is all the more true in view of claim 4, which depends from claim 3 and further provides that the particles are entrapped within the depressions and/or protrusions. If it were true that the depressions and/or protrusions are to be “read on the taught immobilized particles,” such entrapment would be impossible.

In contrast, according to the Examiner's interpretation of the claims in which the particles are the protrusions, the additional limitations recited in claims 3 and 4 become superfluous, and so the Examiner's interpretation cannot be correct. "There is presumed to be a difference in meaning and scope when different words or phrases are used in separate claims." *Tandon Corp. v. United States In 'l Trade Commn*, 831 F.2d 1017, 1023, 4 USPQ2d 1283, 1288 (Fed. Cir. 1987).

Appellant respectfully submits that because the cited patents do not provide each and every element set forth in the claims, no *prima facie* case of anticipation has been established, and requests that the rejection be withdrawn or reversed.

10. Rejection of claim 4 under 35 U.S.C. § 102(b) over Wu, U.S. Patent 5,387,510

Appellant respectfully traverses the rejection of claim 4 as allegedly being anticipated by the Wu patent, and requests that the rejection be withdrawn or reversed.

Claim 4 depends from claim 3, and so contains all of the limitations of both claims 1 and 3. As discussed above, the devices disclosed in the Wu patent are structurally different from those of the present claims. Present claim 1 requires a specific structure: antibodies or fragments thereof capable of binding one or more target ligands. No structure corresponding to the antibodies of the present claims is contemplated in the Wu patent.

Claim 3 adds an additional limitation: that the surface to which the particles are immobilized is "a textured surface comprising one or more depressions and/or protrusions extending between 1 nm and 0.5 mm from said surface."

Claim 4 further provides that "one or more of said particles are entrapped within depressions and/or between protrusions on the textured surface."

Nothing in the Examiner's statement of rejection indicates where such a teaching of entrapping one or more particles "within depressions and/or between protrusions on the textured surface" may be found in the Wu patent. Because the Examiner has the initial burden of establishing a *prima facie* case of anticipation by pointing out where all of the claim limitations appear in a single reference, the Examiner's failure to address the limitations of claim 4 cannot establish a *prima facie* case of anticipation of that claim.

Appellant respectfully submits that because the cited patents do not provide each and every element set forth in the claims, no *prima facie* case of anticipation has been established, and requests that the rejection be withdrawn or reversed.

11. Rejection of claim 6 under 35 U.S.C. § 102(b) over Wu, U.S. Patent 5,387,510

Appellant respectfully traverses the rejection of claim 6 as allegedly being anticipated by the Wu patent, and requests that the rejection be withdrawn or reversed.

Claim 6 depends ultimately from claim 1, and so contains all of the limitations of claim 1. As discussed above, the devices disclosed in the Wu patent are structurally different from those of the present claims. Present claim 1 requires a specific structure: antibodies or fragments thereof capable of binding one or more target ligands. No structure corresponding to the antibodies of the present claims is contemplated in the Wu patent.

Claim 6 further provides that “said nonporous surface forms a capillary space between said nonporous surface and a second surface spaced at a capillary forming distance from said nonporous surface.”

Nothing in the Examiner’s statement of rejection indicates where a teaching of forming such a capillary space between a nonporous surface and a second surface spaced at a capillary forming distance may be found in the Wu patent. Because the Examiner has the initial burden of establishing a *prima facie* case of anticipation by pointing out where all of the claim limitations appear in a single reference, the Examiner’s failure to address the limitations of claim 6 cannot establish a *prima facie* case of anticipation of that claim.

Appellant respectfully submits that because the cited patents do not provide each and every element set forth in the claims, no *prima facie* case of anticipation has been established, and requests that the rejection be withdrawn or reversed.

Conclusion

For the reasons discussed above, Appellant respectfully submits that claims 1 and 3-7 are in condition for allowance, and respectfully request that the rejections be withdrawn or reversed, and that the claims be allowed to issue.

Respectfully submitted,

Date:

04/25/2007

FOLEY & LARDNER  
P.O. Box 80278  
San Diego, CA 92138-0278  
(858) 847-6700 (Voice)  
(858) 792-6773 (Fax)

By:

Barry Wilson

Richard J. Warburg, Reg. No. 32,327  
By Barry Wilson, Reg. No. 39,431  
Attorneys for Applicant



*Appendix A: Claims Appendix*

1. (PREVIOUSLY PRESENTED) An assay device for detecting one or more target ligands in a sample, comprising:

a nonporous surface comprising one or more particles immobilized to said surface, wherein said particles comprise antibodies or fragments thereof immobilized thereon capable of binding said one or more target ligands wherein said particle size range is from 1 nm to 5  $\mu$ m.

2. (CANCELED).

3. (PREVIOUSLY PRESENTED) An assay device according to claim 1, wherein said surface is a textured surface comprising one or more depressions and/or protrusions extending between 1 nm and 0.5 mm from said surface.

4. (PREVIOUSLY PRESENTED) An assay device according to claim 3, wherein one or more of said particles are entrapped within depressions and/or between protrusions on the textured surface.

5. (PREVIOUSLY PRESENTED) An assay device according to claim 1, wherein said particles are selected from the group consisting of latex particles, silica particles, zirconia particles, alumina particles, titania particles, ceria particles, metal sol particles, and polystyrene particles.

6. (PREVIOUSLY PRESENTED) An assay device according to any one of claims 1 and 3-5, wherein said nonporous surface forms a capillary space between said nonporous surface and a second surface spaced at a capillary forming distance from said nonporous surface.

7. (PREVIOUSLY PRESENTED) An assay device according to any one of claims 1 and 3-5, wherein said nonporous surface is not part of a capillary space.

**Appendix B: Evidence Appendix**

1. National Institute of Standards and Technology publication NISTR 6935, "Particle Size Measurement for Spheres with Diameters of 50 nm to 400 nm"  
Argued in Office Action Response filed August 2, 2006 (Exhibit 1)
2. Duke Scientific Corporation Sales Bulletin 112A, "General Purpose Latex Particles"  
Argued in Office Action Response filed August 2, 2006 (Exhibit 2)
3. *Ex Parte Kirkpatrick*, 1997 WL 33147777 (BPAI 1997)

# **Particle Size Measurements for Spheres With Diameters of 50 nm to 400 nm**

**Michelle K. Donnelly and George W. Mulholland  
Building and Fire Research Laboratory  
National Institute of Standards and Technology  
Gaithersburg, Maryland 20899 USA**

## **ABSTRACT**

This paper describes a calibration service NIST is offering that measures the effective diameter of particles suspended in liquids using electrical differential mobility analysis. Measurements are for particles with diameters in the range of 50 nm to 400 nm. Electrical differential mobility analysis separates aerosol particles based on the particle size dependence of their electrical mobility. This measurement method was chosen because it offers lower uncertainty for particles smaller than 400 nm compared to other methods. Detailed descriptions of the calibration system, operating procedures, and analysis method are included. Customer information regarding test sample requirements, measurement uncertainty analysis, and quality control procedures is also included in the paper.

**NIST**

**National Institute of Standards and Technology  
Technology Administration, U.S. Department of Commerce**

## **1. Description of Service**

NIST is offering a calibration service to measure the effective diameter of particles suspended in liquids. The measurement method consists of nebulizing the particle suspension and measuring the size distribution of the particles in aerosol form by electrical differential mobility analysis. The service is primarily designed for measuring polystyrene latex (PSL) spheres in water with a narrow size distribution. Customers targeted are those who need to demonstrate NIST Traceability<sup>1</sup> or who cannot use other techniques to measure the particles. Particles of mean diameter size in the range of 50 nm to 400 nm are measured with an expanded uncertainty (95 % confidence interval) of 1.5 % of the peak size. Plans are to expand the measurement ability to range from 20 nm to 800 nm. The calibration facility will be able to provide a certified peak particle diameter and size distribution results (not certified). In the future we plan to provide certified information regarding the standard deviation of the size distribution.

Customers are asked to provide samples in aqueous suspensions in quantities of 5 mL to 50 mL of concentrated solutions (0.5 % volume fraction or higher). Dilute solutions will require at least 200 mL. The container should be insulated and shipped by next day mail to avoid extended exposure to high or low temperatures.

## **2. Design Philosophy and Theory**

This particle size calibration method uses the physical principle of electrical differential mobility analysis, which separates aerosol particles based on the particle size dependence of their electrical mobility. The particle's electrical mobility  $Z$  is equal to the velocity  $U$  of a charged particle divided by the electrical field strength  $E$ .

$$Z = \frac{U}{E} \quad (1)$$

The electric mobility is computed from a balance of the electrical force due to the charge on the particle and the drag force given by Stoke's law:

$$neE = \frac{3\pi\mu UD_p}{C(D_p)} \quad (2)$$

where  $n$  is the number of charges,  $e$  is the charge of an electron,  $\mu$  is the gas viscosity,  $D_p$  is the particle diameter, and  $C(D_p)$  is the Cunningham slip correction. The factor  $C(D_p)$  approaches one for a particle that is large compared to the mean free path of the gas, and increases as the particle size decreases. From equations (1) and (2), the following expression is obtained for the electrical mobility for the case of singly charged particles ( $n=1$ ):

$$Z = \frac{eC(D_p)}{3\pi\mu D_p} \quad (3)$$

---

<sup>1</sup> NIST has developed an organizational policy on traceability. Official statements regarding this policy and further information can be found at the website: <http://www.nist.gov/traceability>

The electrical mobility for our measurements is obtained by introducing a small flow of charged aerosol particles into a stream of clean air. The combination flows between two co-axial cylinders with a radial electrical field. A small flow through a narrow slit in the center electrode enables high resolution electrical mobility measurements. By scanning the voltage on the center electrode thereby scanning the electrical field strength, and measuring the number concentration of the aerosol exiting the slit, the electrical mobility distribution of the aerosol is determined.

Special considerations were given to the measurement system in order to obtain accurate measurements using the differential mobility analysis method. Most importantly, particle measurements are made relative to NIST Standard Reference Material 1963 (SRM<sup>®</sup> 1963). SRM<sup>®</sup> 1963 is a 100.7 nm PSL sphere solution traceable to the wavelength standard. The system also uses a steady aerosol generator to provide a constant concentration of particles. A carefully constructed recirculation system keeps the sheath flow rate balanced with the excess flow rate, and maintains a flow temperature near room temperature. An electronic barometric pressure gage and thermistors provide accurate temperature and pressure measurements for computing the viscosity and the Cunningham slip correction.

The differential mobility analysis method was chosen to measure the size of particles because it offers lower uncertainty for particles smaller than 400 nm compared to other methods. The relative expanded uncertainty for particles in the 50 nm to 400 nm size range is  $\pm 1.5\%$  of the peak size. This method offers good statistics since each test measures thousands of particles. In addition, the transfer function for the NIST differential mobility analyzer has been determined and is used to help assess the measurement uncertainty.

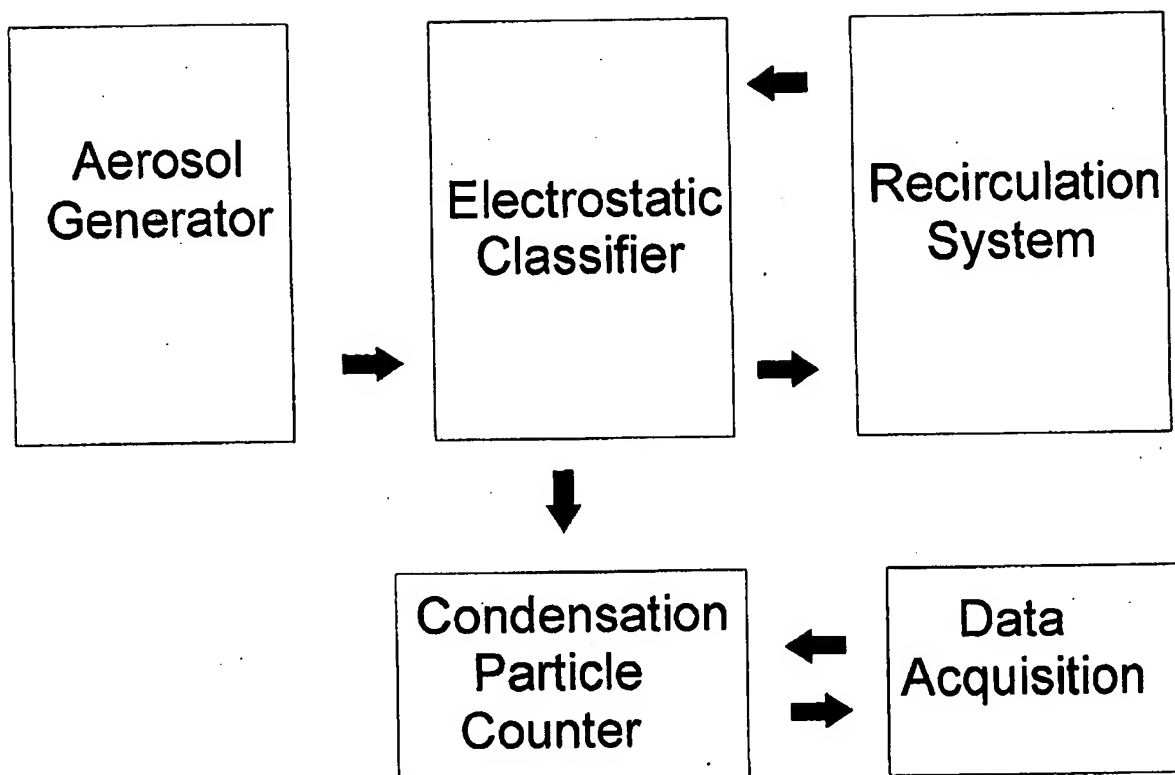
Differential mobility analysis has crucial advantages compared to other measurement methods, such as electron microscopy and light scattering. Differential mobility analysis has lower uncertainties than electron microscopy for the measurement of PSL spheres. The dominant uncertainties for microscopy are magnification uncertainty, determination of the edge of the particle, and electron beam damage to the PSL sphere. Additional issues with electron microscopy are the relatively small number of particles sized and the collection of a representative sample.

While elastic light scattering methods have been shown to provide low uncertainty measurements for particle sizes greater than 500 nm, their uncertainty increases with decreasing particle size because of the lack of structure in the scattering pattern. Quasi-elastic light scattering is sensitive to particle sizes as small as 10 nm to 30 nm; however, this method provides a particle size weighted by the scattering efficiency of the particle. While there are methods for determining the number average diameter, there can be large uncertainties if there is a small population of off-size particles. All the particles contribute to the mean size and it is difficult to remove the effect of the off-size particles on the results.

While the differential mobility analysis method provides the lowest uncertainty, the other methods provide complementary information. For example, electron microscopy provides particle shape information that cannot be obtained by the differential mobility analysis method.

### **3. Description of System**

The equipment comprising the calibration facility consists of five critical components as shown in the block diagram in Figure 1: the aerosol generator, the electrostatic classifier, the condensation particle counter, the recirculation system, and the data acquisition system. All of the components, excluding the recirculation system are commercially available equipment.



**Figure 1.** Equipment for particle measurements.

The PSL aerosol is created using an Aeromaster Constant Number PSL Standard Particle Generator manufactured by JSR Corporation<sup>2</sup>. The generator is a pneumatic atomizer that operates by using a clean air stream to nebulize the liquid solution containing the PSL particles. The liquid aerosol passes through a heated tube where the liquid evaporates leaving only the solid PSL particles as an aerosol. The flow then enters a diluter where it joins a clean air stream. The flow passes through a bipolar charger to reduce the droplet charge. This generator is very stable and maintains a steady particle concentration during testing. The generator is equipped with an air filtration system to ensure that the pressurized input air is free of moisture and particles. Inside the generator, the air passes through a mist trap, a dryer, a coarse filter, and finally a High Efficiency Particulate Air (HEPA) filter before reaching the atomizer or the diluter.

The flow leaving the aerosol generator enters an integrating chamber. The chamber has a volume of approximately 14 L and serves to dampen any short-term fluctuation in the flow. The flow leaves the chamber and reaches the classifier via a path containing regulating vents. The vents are adjusted so only the desired flow rate enters the classifier and the remaining flow is

<sup>2</sup> Certain trade names and company products are mentioned in the text or identified in an illustration in order to adequately specify the experimental procedure and equipment used. In no case does such identification imply recommendation or endorsement by the National Institute of Standards and Technology, nor does it imply that the products are necessarily the best available for the purpose.

sent to the exhaust. This is necessary since the aerosol generator supplies a flow of approximately 16 L/min (267 cm<sup>3</sup>/s) while the typical flow into the classifier is less than 2 L/min (33 cm<sup>3</sup>/s).

The electrostatic classifier used in these experiments is a model 3071A Electrostatic Classifier manufactured by TSI Incorporated. The classifier separates aerosol particles based on their electrical mobility, which is dependent on their charge state and particle size. This allows for a flow of monosize particles to exit the classifier. The classifier contains a bipolar charger (TSI Model 3077 Aerosol Neutralizer) consisting of 2 mCi (7.4 × 10<sup>7</sup> Bq) of Kr-85 radioactive gas contained in a capillary tube. Here the particles collide with bipolar ions resulting in an equilibrium charge distribution that is a function of the particle size. For example, 100 nm particles would emerge from the bipolar charger with 42.6 % of the particles uncharged, 24.1 % with a +1 charge, 24.1 % with a -1 charge, and smaller percentages with multiply charged particles.

After passing through the bipolar charger, the aerosol flows to the differential mobility analyzer (DMA), also located inside the classifier. The DMA is a long cylindrical chamber with a radius of 1.958 cm. Inside the chamber is a 0.937 cm radius rod, concentric to the walls of the chamber so that an annulus is formed between the rod and the chamber walls. The rod voltage can be adjusted from 0 V to -10,000 V. The outer cylindrical chamber is kept at ground potential, allowing for an electrical field to develop within the annulus. The aerosol flow enters the top of the chamber and is joined by a sheath flow of clean air. Both flows travel through the annulus to the bottom of the chamber. Along the way, charged particles move towards the center rod due to the voltage potential. A small slit in the rod allows for the passage of particles with electrical mobility,  $Z$ , as computed by the following equation:

$$Z = \frac{q_{sheath}}{2\pi VL} \ln\left(\frac{r_2}{r_1}\right) \quad (4)$$

where  $q_{sheath}$  is the sheath flow,  $V$  is the rod voltage,  $L$  is the length from the aerosol entrance to the slit, and  $r_1$  and  $r_2$  are the inner and outer radii of the annulus, respectively. By adjusting the voltage, particles of a narrow mobility range are selected. A nearly monosize particle output is achieved by selecting particles based on mobility results. The flow comprised of monosize particles passes through the rod opening and exits the classifier, then flows into the CPC where the number of particles is counted. The rest of the flow leaves the classifier through an excess flow outlet and enters the recirculation system.

A recirculation system pumps the sheath air through the classifier, draws out the excess air and then conditions it before returning it as the sheath air flow. Recirculating the excess air into the sheath inlet ensures that the excess and sheath flow rates are equal. This significantly reduces uncertainties in the size calculations that would be present if these flows were not matched and needed to be measured independently. The recirculation system was not supplied with the TSI model 3071A Electrostatic Classifier. It was built separately at NIST for use with the electrostatic classifier.

A schematic diagram of the recirculation system is shown in Figure 2. Excess air leaves the classifier, passes through an adjustable needle valve and is then filtered through an ultra high efficiency pleated membrane cartridge filter to remove any particles. From the filter, the flow enters a buffer tank. The tank is a brass cylinder 40 cm long with a volume of 6 L. The buffer tank serves to dampen the pulsations caused by the pump. After the buffer tank are two

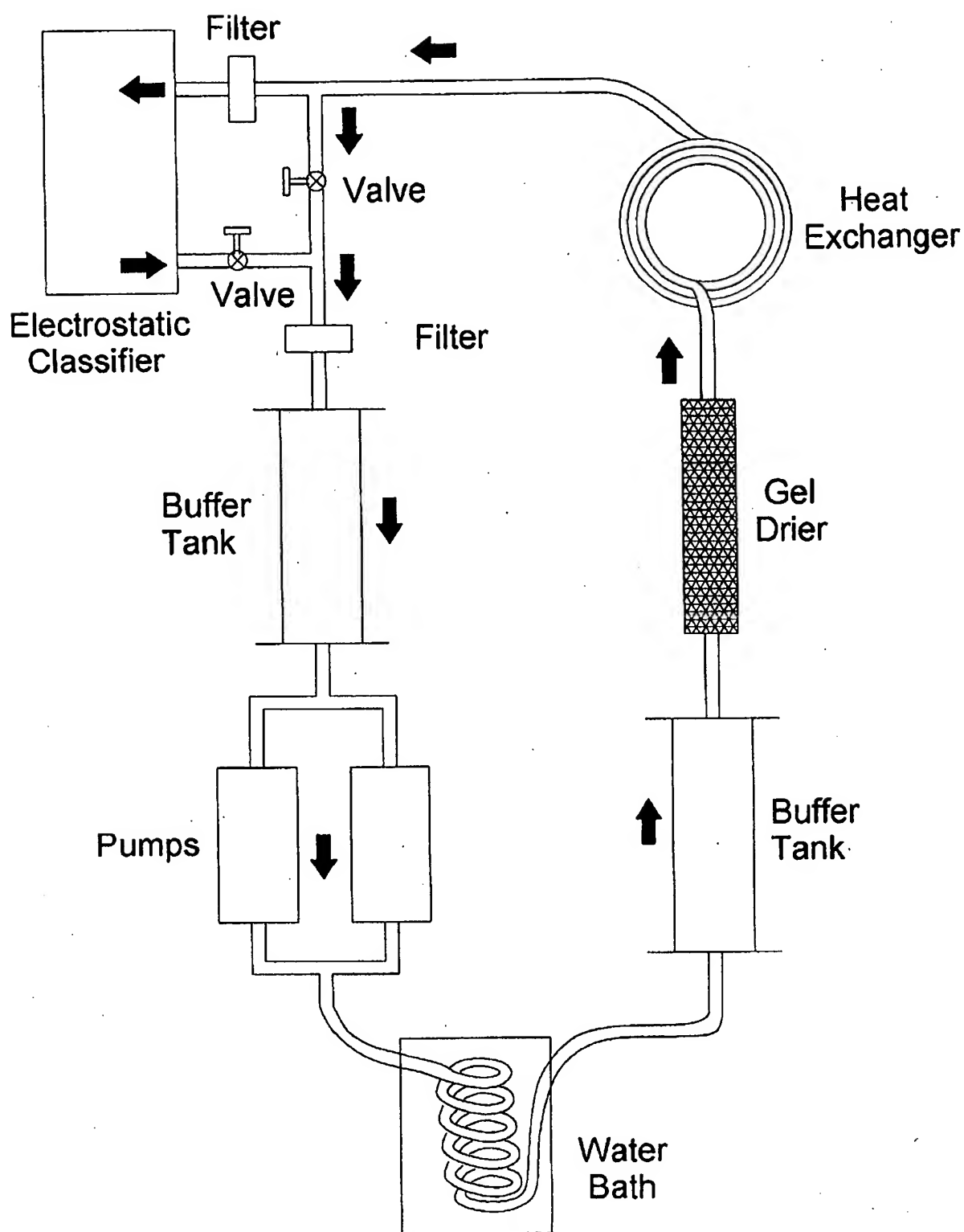


Figure 2. Recirculation system.



diaphragm pumps connected in parallel. The operator can choose to have only one pump operate for low flow rates, or have two pumps operate for higher flow rates. After the pumps, the flow travels through coils submerged in a water bath. Since moving through the pumps heats the flow, the water bath is needed to reduce the temperature of the flow. The bath itself is cooled by a second set of coils carrying chilled water. After leaving the bath, the flow enters another buffer tank, the same size as the first one, to further dampen the effects of the pump. From there the flow travels through a drier packed with silica gel to remove moisture from the flow. It then travels through a coiled section that acts as a heat exchanger to allow the flow to reach room temperature. The conditioned flow reaches a final needle valve where it is split into two flows. Part of the flow is sent through another pleated membrane cartridge filter, to remove any residual particles, and then into the top of the classifier as the sheath flow. The rest of the flow is diverted back into the recirculation system, joining the excess air as it leaves the classifier. Adjusting the needle valve regulates the sheath flow by adjusting how much of the recirculated air enters the classifier.

In addition to the recirculation system, equipment was added to the electrostatic classifier to obtain accurate pressure and temperature measurements. The barometric pressure is measured using a Mensor Corporation Model 4011 digital pressure transducer. The pressure transducer has an accuracy of 0.010 % over the range of 70 kPa to 140 kPa. The transducer provides a digital output to the computer at a rate of 1 Hz. Two ultra-stable thermistors provide temperature measurements of the sheath flow, accurate to  $\pm 0.01$  °C. The thermistors are type CSP Thermoprobes manufactured by Thermometrics, Incorporated with NIST traceable calibrations. One thermistor is located in the upper sheath flow just before it enters the DMA and the other is located after the DMA exit, where the sheath flow becomes the excess flow. The DMA rod was calibrated by using a Spellman HUD-100-1 precision resistor ladder to step down the voltage, which was then measured using a Fluke Corporation 8060A digital multimeter. The DMA output signal was then adjusted so that it matched the actual voltage as measured by the multimeter.

The particle concentration is determined using a model 302201 Condensation Particle Counter (CPC) manufactured by TSI Incorporated. The CPC detects particles by condensing supersaturated butanol vapor onto the particles to make them appear larger before they enter the optical sensing zone where they are counted. The CPC is capable of detecting particles of size 7 nm and larger.

The data acquisition system consists of a desktop computer equipped with data acquisition boards and software for communication with the instruments. Communication with the CPC and the electrostatic classifier is accomplished via an RS-232 serial communications port. Information from the digital pressure transducer is collected using a National Instruments PCI-6503 digital input/output board. Thermistors are connected to a National Instruments TBX-68T Isothermal Terminal Block, which relays the temperature information to a National Instruments 4351 PCI board. A customized data acquisition software program is used to control the instruments and collect the data. Another custom program performs data analysis and computations. Both programs are written using National Instruments LabVIEW software. Detailed descriptions of the programs are included in section 4.

An important element of this measurement process is the NIST SRM<sup>®</sup> 1963 used to calibrate the system. By using the SRM<sup>®</sup>, we are able to accurately determine the flow rates and establish consistent diameter measurements even if environmental conditions change during testing. The SRM<sup>®</sup> 1963 is sized at 100.7 nm, which is in the midrange of the particle sizes

measured. The SRM<sup>®</sup> 1963 has been sized relative to the NIST one micrometer standard, which is sized relative to the wavelength standard. Use of the SRM<sup>®</sup> allows us to obtain accurate particle measurements and to identify possible problems or inconsistencies in the equipment. One potential source of concern using SRM<sup>®</sup> 1963 is the agglomeration of the particles in the suspension so that the SRM<sup>®</sup> cannot be used for calibrating the system. It is also crucial that the dilution of the SRM<sup>®</sup> particles be made with water containing very small amounts of non-volatile impurities, less than 1 µg impurities per g of water, to minimize the size of the residue layer surrounding the PSL spheres as the water in the droplets evaporates.

#### **4. Operating Procedures and Assessment of Uncertainty**

##### **Detailed Operating Procedure**

The following is a complete description of the procedures for actual measurements to calibrate a customer's particle sample.

##### **System start-up:**

Turn on CPC and let it warm up. Display will indicate when it is ready.

Turn on electrostatic classifier and make sure rod voltage is set to zero.

Turn on aerosol particle generator.

Supply inlet air to particle generator at a pressure between 240 kPa and 275 kPa.

Set the aerosol particle generator pressure to 177 kPa (1.8 kg/cm<sup>2</sup>) and flow rate to 16.0 L/min (267 cm<sup>3</sup>/s).

Turn on recirculation pump (or pumps) and turn on cooling water for water bath.

Set the electrostatic classifier flows to desired rates. Typically, the aerosol flow into the classifier is set between 0.5 L/min (8.3 cm<sup>3</sup>/s) and 2.0 L/min (33.3 cm<sup>3</sup>/s) and the sheath flow is set to either 10 L/min (167 cm<sup>3</sup>/s) or 20 L/min (333 cm<sup>3</sup>/s). The aerosol flow into the classifier is controlled by adjusting the vents in-line before the classifier so that the correct amount of flow is vented, leaving the desired flow for the classifier. The sheath flow is controlled by adjusting the two valves in the recirculation system. For higher sheath flows, both recirculation pumps will need to be used. The two flow settings will impact one another, so rechecking and readjusting is necessary until both are at their desired flow rates.

Rinse a clean testing bottle 6 times with filtered, deionized water.

Fill the test bottle with at least 45 mL of filtered, deionized water and place test bottle in the particle generator sample compartment. Lock the test bottle in place, making sure the connection between the test bottle and the generator is sealed by the o-ring.

Allow system to run for at least 30 min with filtered, deionized water before the first calibration to warm up the equipment, prime the system, and stabilize flows and temperatures.

##### **Prepare an SRM<sup>®</sup> 1963 particle suspension:**

Rinse a 250 mL polyethylene container 6 times with filtered, deionized water.

Add 200 mL of filtered, deionized water to the container.

Add 4 drops of SRM<sup>®</sup> 1963 to container, and then shake to mix.

Place the container in ultrasonic bath for 2 min to further mix contents.

SRM<sup>®</sup> concentration will be approximately  $5 \times 10^9$  particles/mL.

First calibration run using SRM<sup>®</sup> 1963 sample:

Place the SRM<sup>®</sup> 1963 container in ultrasonic bath for 60 s.

Rinse a clean testing bottle 6 times with filtered, deionized water.

Pour at least 45 mL of SRM<sup>®</sup> solution into test bottle and place bottle in particle generator sample compartment. Lock the test bottle in place, and check that the connection is sealed by the o-ring.

Check particle generator pressure and flow and adjust if necessary.

Adjust aerosol flow regulating vents, and recirculation system flow controls so that the electrostatic classifier aerosol inlet flow and sheath flow are at desired settings. Rechecking and readjusting may be necessary until both are at their desired flow rates.

Open the data collection program on the computer.

Input a list of classifier voltage settings for the SRM<sup>®</sup> sample into the computer.

Select data filename for SRM<sup>®</sup> 1963 calibration file and input into the computer.

Record the filename, aerosol flow setting, sheath flow setting, and SRM<sup>®</sup> 1963 mixture information in the laboratory notebook.

Start data collection program.

Program will record the voltage, particle concentration, barometric pressure, and both temperature measurements at a frequency of 1 Hz.

All data are written to specified data file.

Readings are collected at each voltage setting for 45 s before changing to the next voltage setting.

Voltage is reset to zero at end of test.

Sample measurement test:

Sample to be tested should contain at least  $5 \times 10^9$  particles/mL.

Remove particle generator test bottle containing SRM<sup>®</sup> 1963.

Place the container of test sample in ultrasonic bath for 60 s.

Rinse a clean testing bottle 6 times with filtered, deionized water.

Pour at least 45 mL of test sample solution into clean, rinsed test bottle and secure bottle in generator sample compartment, making sure the connection is sealed by the o-ring.

Do NOT make any adjustments to any flow or pressure settings on either the particle generator or the classifier.

Input list of desired classifier voltage settings for the sample into the computer.

Select filename for data collection file and input into the computer.

Record the filename, aerosol flow setting, sheath flow setting, and test sample identifying information in the laboratory notebook.

Start data collection program, it will scan the voltages and collect data as before.

Repeat sample measurement test for up to three samples.

After measuring the test samples, do another SRM<sup>®</sup> 1963 calibration run, but do NOT adjust any of the flows:

Remove particle generator test bottle containing sample.

Place the SRM<sup>®</sup> 1963 container in ultrasonic bath for 60 s.

Rinse a clean testing bottle 6 times with filtered, deionized water.

Pour at least 45 mL of SRM<sup>®</sup> solution into clean, rinsed test bottle and place the bottle in the particle generator sample compartment. Lock the bottle in place, and check that the connection is sealed by the o-ring.

Do NOT adjust any flow or pressure settings on either the particle generator or the classifier.

Input a list of classifier SRM<sup>®</sup> voltage settings to the computer.

Select data filename for SRM<sup>®</sup> calibration file and input into the computer.

Record the filename, aerosol flow setting, sheath flow setting, and SRM<sup>®</sup> mixture information in the laboratory notebook.

Start data collection program, it will scan the voltages and collect data as before.

### Explanation of Computer Programs for Data Collection and Analysis

A customized data acquisition software program written using National Instruments LabVIEW software is used for data collection. The program allows the user to input a sequence of voltage settings for the electrostatic classifier. The user can also select a unique data file name for each test. The software program sets the DMA rod to the desired voltage and then collects readings of the temperatures, barometric pressure, and CPC particle concentration at a frequency of 1 Hz. Measurements are collected for a total of 45 s at each voltage setting. A real-time display of the readings, including the CPC particle concentration allows inspection of the data during testing so the experimenter can easily identify if the system is working properly. All of the measurements are recorded in the specified data file in spreadsheet format for easy processing or plotting.

After measurement data are collected, the files are analyzed using a program also written using National Instruments LabVIEW software. Calculations for the diameter size are made using a software program written to automatically perform the computations based on the theoretical equations outlined in the previous section. All of the calculations are made using the best available constants for values such as viscosity, mean free path, the charge of an electron, and the Cunningham slip correction.

First, an accurate sheath flow rate is computed using the SRM<sup>®</sup> 1963 calibration runs collected before and after each set of sample tests. The sheath flow is calculated from the ratio of the theoretical mobility and the experimental mobility. Using the measured barometric pressure and temperature, and setting the diameter to 100.7 nm for the SRM<sup>®</sup> particles, the theoretical mobility is calculated by equation (3). Next, from the experimental data for the SRM<sup>®</sup> 1963 runs, the voltage corresponding to the peak particle concentration is determined by fitting a third order polynomial to and solving for the voltage setting at the peak. From this voltage, and using the nominal value for the sheath flow rate, the experimental mobility is computed using equation (4). Multiplying the nominal sheath flow by the ratio of the theoretical mobility to the experimental mobility gives the corrected sheath flow measurement. An average of the corrected sheath flows for the two SRM<sup>®</sup> runs is used as the sheath flow rate in the test sample calculations. A detailed description of the sheath flow calculations, including constants and intermediate values is given in the appendix.

The test sample data files are reduced to eliminate the transient data collected after a voltage change. The particle concentration generally reaches a stable reading 30 s after a new voltage is set; therefore, the final 15 s of data for each voltage setting are used in the calculations. Mean values are then computed for the temperature, pressure and particle concentration at each

voltage setting. Using the temperature and pressure, the viscosity and mean free path are calculated. Next, the mobility is computed from equation (4) for each voltage setting, using the sheath flow as calculated from the SRM<sup>®</sup> files. Finally, the particle diameter is calculated using the terms computed as given in equation (3) of the previous section. Because the slip correction,  $C$ , is a function of the diameter, an iterative process is used to solve for the particle diameter. A detailed description of the diameter calculations, including the iterative process, is given in the appendix. Once the particle diameter for each voltage setting is calculated, a graph of the particle number concentration verses the corresponding particle diameter is then plotted. The peak diameter size is determined by fitting a third order polynomial to the graph and calculating the diameter at the peak of the curve fit. In cases where samples have a broad size distribution, a correction factor is used that is based on the instrument convolution integral and involves the product of the transfer function times, the charging probability, and the size distribution.

### Uncertainty Analysis

The uncertainty analysis presented below is based on a paper by Mulholland and Fernandez<sup>3</sup>. The components of uncertainty are divided into two categories: Type A are those evaluated by statistical methods and Type B are those evaluated by other means. These types roughly correspond to random and systematic effects. For the particle sizing measurements, the Type A uncertainty is determined from the measurement repeatability and sample variability. The Type B uncertainty includes the uncertainty in the SRM<sup>®</sup> 1963 and the uncertainty in the various physical quantities appearing in equations (1-3). The Type A and Type B uncertainty are combined by a root-sum-of-squares to determine the combined uncertainty. Taking twice the combined uncertainty gives the expanded uncertainty, which is the total uncertainty statement for the calibration.

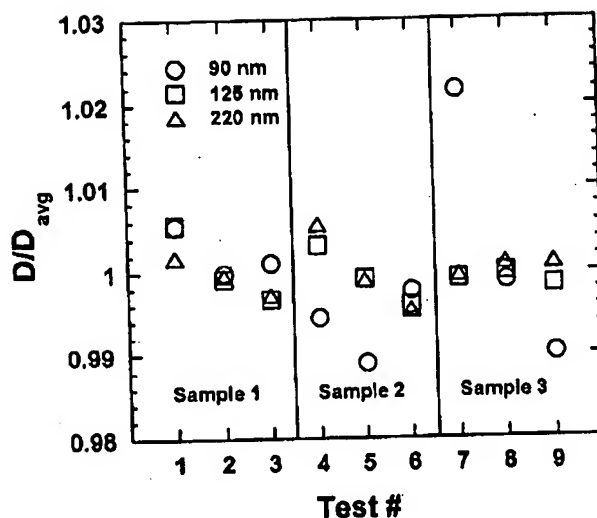
### Type A Uncertainty

Two components contribute to the Type A uncertainty. One is the homogeneity of the sample: that is, sample-to-sample variability. The second is concerned with the measurement repeatability. Both of these components were obtained by making three repeat measurements on each of three different samples. The results are shown in Figure 3. It is seen that all the results are within about 1 % of the average of the peak diameters with the exception of one apparent outlier for the nominal 90 nm particle size. It is evident that the spread in the results are somewhat greater for the 90 nm particles relative to the larger sizes.

The analysis of variance shows no significant difference among diameters from the three different samples from each particle size. This finding translates into a between-sample deviation of zero.

The mean of the nine values of peak diameter,  $D_{\text{peak}}(\text{avg})$ , and the standard deviation of the mean,  $\sigma(A)$ , are computed for each of the three particle sizes with the following results: 92.4 nm, 0.30 nm; 126.9 nm, 0.12 nm; 217.7 nm, 0.21 nm. The standard deviation  $\sigma(A)$  is the total type A uncertainty.

<sup>3</sup> Mulholland, G.W. and Fernandez, M., "Accurate Size Measurement of Monosize Calibration Spheres by Differential Mobility Analysis," American Institute of Physics Conference Proceedings 449, *Characterization and Metrology for ULSI Technology: 1998 International Conference*, edited by D.G. Seiler, A.C. Diebold, W.M. Bullis, T.J. Shaffner, R. McDonald, and E.J. Walters, pp. 819-823, Gaithersburg, Maryland, March 1998.



**Figure 3.** The ratio of the measured peaks in the size distribution to the average for each particle size are plotted to show the repeatability and sample to sample variability.

#### Type B Uncertainty

For five of the uncertainty components - voltage, the calibration particle size, pressure, temperature, and viscosity - the uncertainty analysis is straightforward. First an estimated standard deviation of the variable is obtained and then the resulting effect of changing the variable by one standard deviation on the particle diameter is obtained using equations (1-3). Less direct analysis is required for slip correction, DMA resolution, and data analysis methodology. Here a brief account of the analysis is presented and the unique features of the study described. A more detailed description of the uncertainty analysis is contained in a paper describing the measurement of SRM<sup>®</sup> 1963 by differential mobility analysis.<sup>4</sup>

#### Voltage Calibration

Because errors in the DMA voltage readings were observed in the range of 1 % to 3 % in a previous study, a high voltage (1000 V to 10000 V) calibration facility was set up. The facility consists of a high voltage divider and a digital voltmeter. The high voltage divider (Spellman High Voltage Electronics Corp., Model HVD-100-1) has a standard deviation equal to 0.05 % of the nominal reading. The 10000 to 1 divider output was used resulting in output voltages to the digital voltmeter in the range of 0.1 V to 1.0 V. The digital voltmeter (Fluke Corporation, 8060A) also has a standard deviation of 0.05 % of the nominal reading over this range. Combining in quadrature the two standard deviations leads to a total uncertainty for the voltage calibration of 0.071 % of the reading. In computing the total uncertainty associated with the voltage measurement, the 1.0 V resolution of the DMA voltmeter is also included.

The effect of the change of voltage on particle size is determined via the particle mobility equations. As explained in more detail by Mulholland et al. (1999), the voltage

<sup>4</sup> Mulholland, G.W., Bryner, N.P., and Croarkin, C., "Measurement of the 100 nm NIST SRM 1963 by Differential Mobility Analysis," *Aerosol Science and Technology*, Vol. 31, pp. 39-55, 1999.

uncertainty affects the measurement of the unknown particle size directly but also indirectly through the calibration measurement of the 100 nm SRM<sup>®</sup>. A change in the voltage for the calibration measurement will affect the corrected flow, which will, in turn, affect the measured particle size. Table 1 contains the estimated voltage uncertainty and the resulting uncertainty in the particle size measurement.

#### *Particle Standard*

The 100 nm SRM<sup>®</sup> has a combined uncertainty of 0.47 nm and this uncertainty has the largest effect on the overall uncertainty in the calibration particles. Changing the diameter of the 100 nm calibration particle changes the corrected flow, which, in turn, affects all of the derived particle sizes. As seen in Table 1, the effect is about 0.5 % for each of the three sizes.

#### *Pressure, Temperature, and Viscosity*

The uncertainty in the pressure affects the mean free path  $\lambda$ , which affects the slip correction. The  $4 \times 10^3$  Pa uncertainty in the pressure results in changes of 0.13 % to 0.17 % in the three particle diameters. The temperature and viscosity uncertainties, listed for completeness, have a negligible effect on the overall uncertainty.

#### *Slip Correction*

The effect of the uncertainty in the slip correction on the particle size is subtle. As seen from equations (2) and (3), the value of the slip correction affects the particle size, but the particle size also affects the slip correction. Two separate effects of uncertainty associated with the slip correction have been analyzed. The first, listed as Slip Correction A, is a result of the uncertainty in the constants  $A_1$ ,  $A_2$ , and  $A_3$  as determined by Allen and Raabe<sup>5</sup>. The second, Slip Correction B, is the larger of the two and results from assessing the effect of using two different expressions for the slip correction. For the 200 nm particle, the effect of the slip correction uncertainty (0.5 %) is as large as the effect of the 100.7 nm SRM<sup>®</sup>.

#### *DMA Resolution/Data Analysis*

There are two issues regarding the data analysis that are discussed here even though their impact on the uncertainty analysis is negligible. First, the size distribution output of the DMA is broadened relative to the true size distribution. Second, there is a possibility that the peak size would be shifted by a change in the voltages selected for the analysis. Both of these effects were estimated using the DMA transfer function and assuming Gaussian size distributions for the three calibration particles. In one set of calculations the voltages were also adjusted by 20 V to 50 V. As shown in Table 1, the largest effect was only 0.06 % of the particle size.

#### *Computation of Total Uncertainty*

The total Type B uncertainty,  $\sigma(B)$ , is obtained as the root-sum-of-squares of the individual standard deviations. The total Type A and Type B uncertainty are also combined as a root-sum-of-squares to obtain the combined uncertainty,  $u(D_{peak})$ . The expanded uncertainty  $U(D_{peak})$ , defined such that there is an approximately 95 % level of confidence that the true average peak diameter is within  $\pm U(D_{peak})$  of the measured average, is calculated as  $2u(D_{peak})$ .

---

<sup>5</sup> Allen, M.D. and Raabe, O.G., "Slip Correction Measurements of Spherical Solid Aerosol Particles in an Improved Millikan Apparatus," *Aerosol Science and Technology*, Vol. 4, pp. 269-286, 1985.

### Summary of Uncertainty Analysis

The values of the average peak diameters  $D_{peak}$  (avg) and the associated expanded uncertainty  $U(D_{peak})$  are the following: 92.4 nm  $\pm$  1.1 nm, 126.9 nm  $\pm$  1.4 nm, and 217.7 nm  $\pm$  3.4 nm. We believe that these three sizes together with the 100.7 nm SRM<sup>®</sup> are the most accurately characterized particles in the size range less than 250 nm. The use of these materials together with other commercially available size standards based on these materials is expected to greatly improve the accuracy of calibration and measurement equipment.

Table 1. Uncertainties of Nominal 90 nm, 125 nm, and 220 nm Calibration Particles

Variable y, nominal value	$\sigma(y)$	$\sigma(90)$ , nm	$\sigma(125)$ , nm	$\sigma(220)$ , nm
Voltage				
1400 V	1.4 V	0.05		
2520 V	2.0 V		0.06	
5900 V	4.3 V			0.11
1650 V	1.5 V	0.05	0.06	0.11
Pressure				
101 kPa	4 kPa	0.16	0.21	0.29
Temperature				
22.0 °C	0.5 °C	0.02	0.01	0.04
Viscosity				
$1.8277 \times 10^{-5}$ Pa · s	$7.3 \times 10^{-9}$ Pa · s	0.02	0.03	0.06
100.7 nm SRM <sup>®</sup>	0.47 nm	0.43	0.63	1.20
Slip Correction A		0.07	0.11	0.17
Slip Correction B		0.05	0.20	1.16
DMA Resolution		0.06	0.04	0.09
Spline Fit		0.01	0.06	0.05
$\sigma(B)$ , total class B uncertainty		0.47	0.71	1.71
$\sigma(A)$ , total class A uncertainty		0.30	0.12	0.21
$u(D_{peak})$ , combined uncertainty		0.56	0.72	1.72
$U(D_{peak})$ , expanded uncertainty		1.12	1.44	3.44

### 5. Quality Control Procedures

In order to ensure that the calibrations are performed correctly, only qualified personnel will be authorized to perform the calibration measurements. They are trained to monitor the performance of the system and to recognize any malfunctions with the equipment that may cause inaccurate results. The report of calibration will also be reviewed by certified personnel to ensure that it is accurate in every respect.

Because the customer will be supplying a test sample that will be consumed during the measurement process, there will be no device or sample to be returned to the customer. The customer will receive a report detailing the size measurement results.

The checking mechanism for determining if the equipment is operating properly during the measurement is the calibration of the equipment using the SRM<sup>®</sup> 1963. Calibrations with the SRM<sup>®</sup> are performed before, after, and between regular measurements. Inconsistencies in the



results of SRM<sup>®</sup> calibration tests performed over several months indicate system troubles including calibration of equipment or leaks in the flow. A recalibration of the DMA voltage using the resistor ladder is performed periodically to maintain accurate voltage measurements. Recalibration of the thermistors and digital pressure transducer are completed periodically using resources available at NIST. Calibration documentation will be update as necessary to include any changes to the equipment or procedure.

## **6. Safety Considerations**

The calibration process involves possible safety hazards, therefore, precautions must be taken when performing these measurements. The electrostatic classifier contains a high voltage DC source with a maximum voltage of 10000 V. This voltage is contained within the inner column with the outer column grounded so the user is not exposed to the high voltage. The current associated with the high voltage is relatively small (maximum of 100  $\mu$ A). Caution must be exercised when calibrating the voltage using a voltage divider and a precision voltmeter since a connection will be made from the high voltage power supply and the divider circuit.

The electrostatic classifier contains a Kr-85 radioactive source, which emits  $\beta$  radiation. The source strength is 2 mCi ( $7.4 \times 10^7$  Bq). It is contained within a capillary tube and there is no external exposure. Still, proper handling, inventorying, and shipping procedures need to be followed.

The condensing liquid for the condensation particle counter is n-butanol. The Materials Safety Data Sheet advises that n-butanol is a severe irritant, that can cause damage through inhalation, ingestion or skin absorption. Inhalation or ingestion of n-butanol can result in severe internal injuries and possible death. Contact should be avoided since it can cause damage to eyes or skin. During normal system operations, the n-butanol is fully contained within sealed lines and containers. The experimenter has potential contact with the n-butanol only when filling or draining the containers, and safety gloves, safety glasses, and a laboratory coat are worn at these times. Additionally, the containers will be filled or drained only under a well-ventilated hood. The condensation particle counter exhaust that contains n-butanol vapor is vented from the lab to avoid exposure by the experimenter.

The excess flow from the aerosol generator and the electrostatic classifier is also vented from the laboratory, since the flows contain a large fraction of aerosol particles in the size range that may be respired deep into the lungs if inhaled.

## **7. Education and Training Considerations**

There are no plans for providing training material at this time. If there is a need for more detailed information by other laboratories providing size calibration, training material will be provided in the future.

## APPENDIX

### Sheath Flow Calculations

$T$  = Temperature from data file [K]

$P$  = Pressure from data file [mm Hg], (barometric pressure + pressure drop in DMA)

$e = 1.60219 \times 10^{-19}$ , charge of one electron [C]

#### Theoretical Mobility

Set Diameter to 100.7 nm:  $D = 100.7 \times 10^{-9}$  [m]

Compute Viscosity:  $\mu = \frac{1.4618 \times 10^{-6} (T^{1.5})}{T + 110.4}$  [kg / m·s]

Compute Mean Free Path:  $MFP = \frac{(2.3709 \times 10^{-7})(T)}{P \left(1 + \frac{110.4}{T}\right)}$  [m]

Compute Knudsen number:  $Kn = \frac{2MFP}{D}$

Compute Cunningham Slip Correction:  $C = 1 + Kn \left(1.142 + 0.558 \exp\left(\frac{-0.999}{Kn}\right)\right)$

Compute Theoretical Mobility:  $Z_{theory} = \frac{eC}{(3\pi\mu)D}$  [C·s/kg]

#### Experimental Mobility

$L = 0.4444$  [m], length from aerosol entrance to slit in DMA

$r_1 = 0.009370$  [m], inner radius of DMA annulus

$r_2 = 0.019580$  [m], outer radius of DMA annulus

$q_{nominal}$  = nominal sheath flow [m<sup>3</sup>/s]

$V_{peak}$  = voltage corresponding to the peak particle concentration from SRM<sup>®</sup> test

Compute Experimental Mobility:  $Z_{experimental} = \frac{q_{nominal}}{2\pi V_{peak} L} \ln\left(\frac{r_2}{r_1}\right)$  [C·s/kg]

#### Corrected Sheath Flow

$q_{sheath} = \frac{Z_{theory}}{Z_{experimental}} (q_{nominal})$  [m<sup>3</sup>/s]

### Diameter Calculations

$q_{sheath}$  = corrected sheath flow as computed from above [ $\text{m}^3/\text{s}$ ]

$V$  = Voltage from data file [V]

$T$  = Temperature from data file [K]

$P$  = Pressure from data file [mm Hg], (barometric pressure + pressure drop in DMA)

$e = 1.60219 \times 10^{-19}$ , charge of one electron [C]

$L = 0.4444$  [m], length from aerosol entrance to slit in DMA

$r_1 = 0.009370$  [m], inner radius of DMA annulus

$r_2 = 0.019580$  [m], outer radius of DMA annulus

$$\text{Compute Viscosity : } \mu = \frac{1.4618 \times 10^{-6} (T^{1.5})}{T + 110.4} \quad [\text{kg} / \text{m} \cdot \text{s}]$$

$$\text{Compute Mean Free Path : } MFP = \frac{(2.3709 \times 10^{-7})(T)}{P \left(1 + \frac{110.4}{T}\right)} \quad [\text{m}]$$

$$\text{Compute Mobility: } Z = \frac{q_{sheath}}{2\pi VL} \ln\left(\frac{r_2}{r_1}\right) \quad [\text{C} \cdot \text{s} / \text{kg}]$$

$$\text{Compute intermediate term } PAR \text{ (solve for } D \text{ without Slip Correction): } PAR = \frac{e}{3\pi\mu Z} \quad [\text{m}]$$

$$\text{Calculate Initial Guess for Diameter: } D_{initial} = \frac{PAR + \sqrt{PAR(PAR + (8 \times MFP \times 1.142))}}{2} \quad [\text{m}]$$

### Start Iterative Process to Determine Particle Diameter

$$\text{Compute Knudsen number: } Kn = \frac{2MFP}{D_{initial}}$$

$$\text{Compute Cunningham Slip Correction: } C = 1 + Kn \left(1.142 + 0.558 \exp\left(\frac{-0.999}{Kn}\right)\right)$$

$$\text{Compute Diameter with Slip Correction: } D_{slip} = C(PAR) \quad [\text{m}]$$

$$\text{Compare Diameter with Slip Correction to Initial Guess: } Comparison = \left| \frac{D_{initial} - D_{slip}}{D_{slip}} \right|$$

If *Comparison* is not less than  $1 \times 10^{-14}$  [m] then Calculate  $D_i$  as:  $D_i = \frac{D_{initial} + D_{slip}}{2}$  [m]

Using  $D_i$  Repeat the Iterative Process as follows until the *Comparison* between  $D_i$  and  $D_{slip}$  is less than  $1 \times 10^{-14}$  [m].

Repeat Iterative Process

Compute Knudsen number:  $Kn = \frac{2MFP}{D_i}$

Compute Cunningham Slip Correction:  $C = 1 + Kn \left( 1.142 + 0.558 \exp\left(\frac{-0.999}{Kn}\right) \right)$

Compute Diameter with Slip Correction:  $D_{slip} = C(PAR)$  [m]

Compare Diameter with Slip Correction to Initial Guess:  $Comparison = \left| \frac{D_i - D_{slip}}{D_{slip}} \right|$

Compute a new value for  $D_i$  by:  $D_i = \frac{D_i + D_{slip}}{2}$  [m]

If *Comparison* is not less than  $1 \times 10^{-14}$  [m] then go back and repeat the iterative process again, using the new value for  $D_i$ , and starting with computing a new Knudsen Number.

If *Comparison* is less than  $1 \times 10^{-14}$  [m] then you have solved for the particle diameter:  $D_{particle} = D_i$ .



# General Purpose Latex Particles

## 5000 Series Latex Microsphere Suspensions

## 7000 Series Copolymer Microsphere Suspensions

*Higher Concentration Polymer Microspheres  
in 15, 100 and 1,000 mL Bottles*

### Applications:

- Research and development
- Filter testing
- Fluid mechanics testing

### Advantages:

- High concentration
- Large quantities available
- Uniform particle size

### Benefits:

- Suspended in DI H<sub>2</sub>O
- Convenient packaging



**Product Description.** This group of products is designed to meet the need for particulate materials with a variety of particle sizes and properties. They are useful for applications such as filter evaluation and testing, fluid mechanics research, dispersion studies and many other research and development projects. They are not intended for use as instrument calibrants or diagnostic reagents because they lack the exacting specifications needed for those applications.

### Product Attributes

Particle Composition:	Polystyrene or Polystyrene crosslinked with DVB
Particle Sizes:	Mean Diameters from 0.03 to 220 microns
Concentration:	10% Solids
Particle Density:	1.05 g/cm <sup>3</sup>
Index of Refraction:	1.59 @ 589 nm (25°C)
Bottle Size:	15 mL, 100 mL and 1000 mL (all at 10% solids)
Expiration Date:	≥ 24 months
Additives:	Contains a trace amount of surfactant
Package Includes:	Material Safety Data Sheet General Product Handling Insert Sheet
Storage & Handling:	Store at room temperature or refrigerated. Keep bottle tightly sealed to avoid contamination.

Particle size determined by:  
Photon Correlation Spectroscopy  
Optical Microscopy  
Laser Diffraction

## 5000 Series

## Latex Microsphere Suspensions

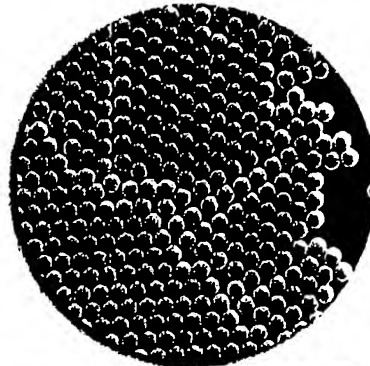
5000 Series

Higher Concentration Polymer Microspheres  
in 15, 100 and 1,000 mL Bottles

### Applications

This line of polystyrene latex particles can be used for a variety of procedures requiring uniform particle sizes in the colloidal size range. Particles of this size are of special interest for research in light scattering, microporous filter checking or aerosol particle generation. The polystyrene microspheres have a density of 1.05 g/cm<sup>3</sup> and a refractive index of 1.59 @ 589 nm. Particle diameters are measured by optical microscopy, photon correlation spectroscopy, or light scattering. They are packaged as aqueous suspensions at 10% solids by weight.

Our 5000 series particles range up to 3.1 microns in size. If you require larger particles, please refer to our 7000 series particles found on the next page.



Product Attributes	
Particle Composition:	Polystyrene
Particle Sizes:	Mean Diameters from 0.03 to 3.1 microns
Concentration:	10% Solids
Particle Density:	1.05 g/cm <sup>3</sup>
Index of Refraction:	1.59 @ 589 nm (25°C)
Bottle Size:	15 mL, 100 mL* and 1000 mL* (all at 10% solids)
Expiration Date:	≥ 24 months
Additives:	Contains a trace amount of surfactant
Package Includes:	Material Safety Data Sheet (MSDS) General Product Handling Insert Sheet
Storage & Handling:	Store at room temperature or refrigerated. Keep bottle tightly sealed to avoid contamination.

\* "B" bottles (100 mL) and "C" bottles (1000 mL) are packaged to order (please allow 3-7 working days).

Ordering Information			
Catalog Number	Mean Diameter (μm)	Size Uniformity (C.V.)	
15mL	100mL*		
5003A	5003B	0.03	≤18%
5006A	5006B	0.06	≤18%
5008A	5008B	0.08	≤18%
5009A	5009B	0.09	≤15%
5010A	5010B	0.10	≤15%
5011A	5011B	0.11	≤12%
5012A	5012B	0.12	≤12%
5014A	5014B	0.14	≤6%
5016A	5016B	0.16	≤6%
5017A	5017B	0.17	≤5%
5020A	5020B	0.20	≤5%
5022A	5022B	0.22	≤3%
5024A	5024B	0.24	≤3%
5026A	5026B	0.26	≤3%
5030A	5030B	0.30	≤3%
5031A	5031B	0.31	≤3%
5033A	5033B	0.34	≤3%
5036A	5036B	0.36	≤3%
5043A	5043B	0.43	≤3%
5045A	5045B	0.45	≤3%
5049A	5049B	0.49	≤3%
5050A	5050B	0.50	≤3%
5051A	5051B	0.51	≤3%
5052A	5052B	0.52	≤3%
5060A	5060B	0.60	≤3%
5065A	5065B	0.65	≤3%
5067A	5067B	0.67	≤3%
5074A	5074B	0.74	≤3%
5081A	5081B	0.82	≤3%
5088A	5088B	0.87	≤3%
5090A	5090B	0.89	≤3%
5093A	5093B	0.93	≤3%
5100A	5100B	1.0	≤3%
5130A	5130B	1.3	≤5%
5153A	5153B	1.5	≤4%
5200A	5200B	2.0	≤4%
5300A	5300B	3.0	≤5%
5312A	5312B	3.1	≤5%

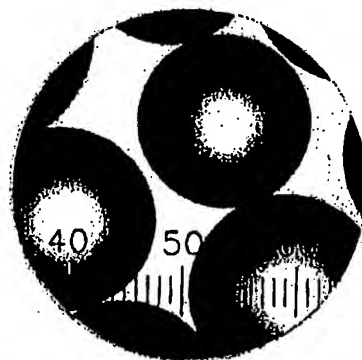
# Copolymer Microsphere Suspensions

7000 Series

*Higher Concentration Polymer Microspheres  
in 15, 100 and 1,000 mL Bottles*

## Applications

Suspensions of large copolymer microspheres are useful as model systems for fluid mechanics experiments, and as challenge particles for large pore filtration systems. They are also useful as experimental particles for acoustical and optical analytical systems. They are composed of polystyrene polymer, cross-linked with 4 to 8% divinylbenzene (DVB). The particles are chemically inert; they can be washed with alcohol, vacuum or air dried, and autoclaved. The polymer density is 1.05 g/cm<sup>3</sup> and the index of refraction is 1.59 @ 589 nm. They are packaged as aqueous suspensions at 10% solids by weight.



## Product Attributes

Particle Composition:	Polystyrene crosslinked with DVB
Concentration:	10% Solids
Particle Density:	1.05 g/cm <sup>3</sup>
Index of Refraction:	1.59 @ 589 nm (25°C)
Bottle Size:	15 mL, 100 mL* and 1000 mL* (all at 10% solids)
Expiration Date:	≥ 24 months
Additives:	Contains trace amount of surfactant
Package Includes:	Material Safety Data Sheet (MSDS) General Product Handling Insert Sheet
Storage & Handling:	Store at room temperature or refrigerated. Keep bottle tightly sealed to avoid contamination.

\* "B" bottles (100 mL) and "C" bottles (1000 mL) are packaged to order (please allow 3-7 working days).

## Ordering Information

Catalog Number		Mean Diameter (μm)	Size Uniformity (C.V.)
15mL	100mL*		
7503A	7503B	3.2	≤45%
7505A	7505B	4.3	≤25%
7508A	7508B	8.0	≤20%
7510A	7510B	9.6	≤20%
7516A	7516B	16	≤16%
7520A	7520B	19	≤16%
7525A	7525B	26	≤15%
7545A	7545B	45	≤15%
7550A	7550B	55	≤16%
7575A	7575B	71	≤15%
7590A	7590B	85	≤16%
7602A	7602B	98	≤16%
7640A	7640B	134	≤16%
7725A	7725B	222	≤12%

**General Purpose Latex Particles**  
**5000 Series Latex Microsphere Suspensions**  
**7000 Series Copolymer Microsphere Suspensions**  
*Higher Concentration Polymer Microspheres*  
*in 15, 100 and 1,000 mL Bottles*

**Sales Bulletin 112A**

10/15/05

All products are manufactured and packaged at our ISO 9001:2000 registered facility in Palo Alto. Please feel free to contact our technical services department if you have any questions about these products or have a special material requirement not listed here.

**LIMITED WARRANTY:** These products are intended for laboratory research use by trained scientific personnel. Determination of their suitability for specific end use is solely the responsibility of the user, who assumes all liability for loss or damage arising out of the use of the product. Rebottling or relabeling voids the warranty and certification. Duke Scientific Corporation's warranty is limited to replacement of defective products if returned with our authorization within 60 days of purchase date.

**Duke Scientific Corporation**

2463 Faber Place, P. O. Box 50005

Palo Alto, California 94303

800-334-3883 or 650-424-1177

Fax: 650-424-1158

[www.dukescientific.com](http://www.dukescientific.com)

Technical Support: [info@dukesci.com](mailto:info@dukesci.com)



**Duke Scientific  
Corporation**

*Your Trusted Partner in Particle Science*



Westlaw.

1997 WL 33147777 (Bd.Pat.App & Interf.)

(Cite as: 1997 WL 33147777 (Bd.Pat.App & Interf.))

\*1

Board of Patent Appeals and Interferences

Patent and Trademark Office (P.T.O.)

EX PARTE RICHARD A. KIRKPATRICK II

Appeal No. 1997-0440

Application No. 08/582,237

NO DATE REFERENCE AVAILABLE FOR THIS DOCUMENT

William D. Lanyi

Honeywell Inc.

Office of General Counsel

11 West Spring Street

Freeport, IL 61032

Before KRASS, FLEMING, and LALL

Administrative Patent Judges.

LALL

Administrative Patent Judge.

ON BRIEF

DECISION ON APPEAL

This is a decision on the appeal under 35 U.S.C. § 134 from the final rejection of claims 1, 2, and 5 to 7. Claims 3, 14, 17 and 18 are indicated to be allowed. Claims 8 to 13 are canceled. The rejections of claims 4, 15 and 16 are withdrawn.

The invention is directed to a circuit which limits the output of an amplifier to a value that is determined as a preselected percentage of a reference value. The invention achieves this by providing a current sourcing comparator that provides a current at its output which is independent of the voltage at its output. The magnitude of the current at the output of the current sourcing comparator is a function of the voltages at its inverting and noninverting inputs and is unaffected by the changing voltage at its output. The invention is further illustrated by the following claim below.

1. A circuit for providing a limited amplifier output, comprising:
  - a first source of a first signal;
  - a first amplifier having a first input and a first output, said first input be-

ing connected in electrical communication with said first source;

a second amplifier having a second input and a third input, said second amplifier having a second output, said second output being connected to said first input, said third input being connected to said first output, said second amplifier being a current sourcing comparator and said second output being connected to provide a current to said first input to prevent an increase in the magnitude of said first output;

a second source of a reference signal; and

first means for providing a second signal which is a first preselected percentage of said reference signal, said second signal being connected to said second input.

The Examiner relies on the following references:

Veranth 3,822,408 Jul. 2, 1974

Beaudette 3,999,084 Dec. 21, 1976

Claim 5 stands rejected under 35 U.S.C. § 112, second paragraph. Claims 1, 2, and 5 to 7 stand rejected under 35 U.S.C. § 102 over Beaudette or Veranth.

Rather than repeat in toto the positions and the arguments of Appellant or the Examiner, we make reference to the brief and the answer [FN1] for their respective positions.

#### OPINION

\*2 We have considered the rejections advanced by the Examiner. We have, likewise, reviewed Appellant's arguments against the rejections as set forth in the briefs.

We affirm.

Since there are rejections under 35 U.S.C. § 112, second paragraph and 35 U.S.C. § 102, we review the applicable laws before considering the specific rejections.

Rejection under 35 U.S.C. § 112, second paragraph

The second paragraph of 35 U.S.C. § 112 requires claims to set out and circumscribe a particular area with a reasonable degree of precision and particularity. In re Johnson, 558 F.2d 1008, 1015, 194 USPO 187, 193 (CCPA 1977). In making this determination, the definiteness of the language employed in the claims must be analyzed, not in a vacuum, but always in light of the teachings of the prior art and of the particular application disclosure as it would be interpreted by one possessing the ordinary level of skill in the pertinent art. Id.

The Examiner's focus during examination of claims for compliance with the requirement for definiteness of 35 U.S.C. § 112, second paragraph, is whether the claims meet the threshold requirements of clarity and precision, not whether more suitable language or modes of expression are available. Some latitude in the manner of ex-

pression and the aptness of terms is permitted even though the claim language is not as precise as the Examiner might desire. If the scope of the invention sought to be patented cannot be determined from the language of the claims with a reasonable degree of certainty, a rejection of the claims under 35 U.S.C. § 112, second paragraph, is appropriate.

Thus, the failure to provide explicit antecedent basis for terms does not always render a claim indefinite. As stated above, if the scope of a claim would be reasonably ascertainable by those skilled in the art, then the claim is not indefinite. See *Ex parte Porter*, 25 USPO2d 1144, 1146 (Bd. Pat. App. & Int. 1992).

Furthermore, Appellant may use functional language, alternative expressions, negative limitations, or any style of expression or format of claim which makes clear the boundaries of the subject matter for which protection is sought. As noted by the court in *In re Swinehart*, 439 F.2d 210, 213, 169 USPO 226, 229 (CCPA 1971), a claim may not be rejected solely because of the type of language used to define the subject matter for which patent protection is sought.

#### Rejection under 35 U.S.C. § 102

\*3 We note that a prior art reference anticipates the subject of a claim when the reference discloses every feature of the claimed invention, either explicitly or inherently (see *Hazani v. U.S. Int'l Trade Comm'n*, 126 F.3d 1473, 1477, 44 USPO2d 1358, 1361 (Fed. Cir. 1997) and *RCA Corp. v. Applied Digital Data Sys., Inc.*, 730 F.2d 1440, 1444, 221 USPO 385, 388 (Fed. Cir. 1984)).

We are further guided by the precedents of our reviewing court that, under 35 U.S.C. § 112, second paragraph, and under 35 U.S.C. § 102, limitations from the disclosure are not to be imported into the claims. *In re Lundberg*, 244 F.2d 543, 548, 113 USPO 530, 534 (CCPA 1957); *In re Queener*, 796 F.2d 461, 463-64, 230 USPO 438, 440 (Fed. Cir. 1986). We also note that the arguments not made separately for any individual claim or claims are considered waived. See 37 CFR § 1.192 (a) and (c). *In re Baxter Travenol Labs.*, 952 F.2d 388, 391, 21 USPO 2d 1281, 1285 (Fed. Cir. 1991) ("It is not the function of this court to examine the claims in greater detail than argued by an appellant, looking for nonobvious distinctions over the prior art."); *In re Wiechert*, 370 F.2d 927, 936, 152 USPO 247, 254 (CCPA 1967) ("This court has uniformly followed the sound rule that an issue raised below which is not argued in this court, even if it has been properly brought here by a reason of appeal, is regarded as abandoned and will not be considered. It is our function as a court to decide disputed issues, not to create them.")

#### Analysis

At the outset, we note that Appellant elects to have the claims stand or fall together [brief, page 2].

#### Claim 5 under 35 U.S.C. § 112, second paragraph

The Examiner asserts [answer, page 3] that "[i]n claim 5, the language therein is

not at all understood nor seen to find support. Clearly, from the specification, the 'hall sensor' provides the 'first signal', but is separate from the circuit." The first statement seems to point to the lack of enablement under 35 U.S.C. § 112, first paragraph, and not to any thing under 35 U.S.C. § 112, second paragraph. However, the Examiner has not pursued any further the possibility of the lack of enablement, and we do not raise this issue. The second statement still does not form a basis for a rejection under 35 U.S.C. § 112, second paragraph. Appellant has illustrated [brief, pages 27 to 28] how claim 5 is to be read in the context of the disclosure. We find that the metes and bounds of claim 5 are clear in accordance with the precepts of 35 U.S.C. § 112, second paragraph, discussed above. Therefore, we do not sustain the rejection of claim 5 under 35 U.S.C. § 112, second paragraph. Claims 1, 2, and 5 to 7 under 35 U.S.C. § 102 over Beaudette

\*4 We consider claim 1 as the representative claim of the group. The Examiner has detailed the manner in which he reads the claimed structure on Beaudette [answer, page 4]. Furthermore, in response to Appellant's arguments [[brief, pages 28 to 33], the Examiner has provided an explanation [answer, pages 10 to 11] as to how Beaudette meets the claimed limitation of "said second amplifier being a current sourcing comparator and said second output being connected to provide a current to said first input to prevent an increase in the magnitude of said output." We do not find any specific arguments by Appellant to counter the Examiner's specific analysis. Appellant only offers mere comments and an opinion, but these cannot take the place of specific factual counter evidence. Therefore, we agree with the Examiner that, in Beaudette, using the terminology for the circuit components as identified the Examiner, the second amplifier serves as a current source and a comparator and supplies its output (i.e., the second output at the node between resistors R2 and R3) to the first input at 12, and this input operates to keep the first output (i.e., E) from experiencing an increase in its magnitude, see the limited value  $E_2$  for  $E_0$  in Fig. 2. The Examiner has thus made a prima facie case of anticipation. Appellant has not offered a specific rebuttal. Therefore, we sustain the anticipation rejection of claim 1, and its grouped claims 2 and 5 to 7 over Beaudette.

Claims 1, 2, and 5 to 7 under 35 U.S.C. § 102 over Veranth

We again take claim 1 as the representative of the group. The Examiner has presented [answer, page 4] the manner how he designates the various components of the circuit as the various claimed elements. For example, he identifies the second amplifier as comprising "15, R4, 23 and 24" [id.] and the second output as the signal at the node between 23 and 24 (answer, page 11). Thus, the Examiner asserts that the second output from the second "current sourcing comparator" 15 is in communication with the first input 12 of amplifier 14, and by definition, the first output (the output of amplifier 14) is clamped (see waveform 27), that is, it is kept from changing, or experiencing an increase. Thus, we conclude that the Examiner has established a prima facie case of anticipation. Appellant's arguments [brief, pages 28 to 33] are merely of general nature and can not serve as factual counter evidence against the Examiner's specific case of anticipation. Therefore, we sustain the anticipation rejection of claim 1 and its grouped claims 2, and 5 to 7 over Veranth. In summary, we have sustained the anticipation rejection of claims 1, 2, and 5 to 7

over Beaudette or Veranth, while we have not sustained the rejection of claim 5 under 35 U.S.C. § 112, second paragraph.

\*5 Accordingly, the decision of the Examiner rejecting claims 1, 2, and 5 to 7 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

BOARD OF PATENT APPEALS AND INTERFERENCES

Errol A. Krass

Administrative Patent Judge

Michael R. Fleming

Administrative Patent Judge

Parshotam S. Lall

Administrative Patent Judge

FN1. Our decision is based on the corrected answer [paper no. 19]. This case was remanded [paper no. 18] to the Examiner for clarification of his position. In the corrected answer, the Examiner withdrew some of the rejections, but did not introduce any new rejections. Appellant did not file any response to the new Examiner's answer. We have found that Appellant had indeed argued in his brief before the remand [paper no. 16] the rejections which the Examiner has maintained in his corrected answer. Thus, we consider the Appellant's brief filed before the remand in making this decision.

1997 WL 33147777 (Bd.Pat.App & Interf.)

END OF DOCUMENT

**Appendix C: Related Proceedings Appendix**

None.